Supreme Court, U.S.
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No. ——

IN THE

# Supreme Court of the United States

BALTIMORE RAVENS, INCORPORATED AND
NATIONAL FOOTBALL LEAGUE PROPERTIES, INCORPORATED,
*Petitioners,*

v.

FREDERICK E. BOUCHAT,
*Respondent.*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit**

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

(1) Does the split Fourth Circuit panel decision improperly authorize a district court to ignore its gatekeeping role by permitting a jury to find an ultimate fact based solely on a string of four separate, necessary, unsupported, contradicted inferences, in the face of directly contradicting decisions of this Court and of other United States Courts of Appeals?

(2) Should copyright law's access requirement be eliminated implicitly by permitting a jury to infer access to the allegedly infringed work based on a string of four separate, necessary, unsupported, contradicted inferences *alone*, thus creating a split between the Fourth Circuit and other United States Courts of Appeals on the issue?

(3) Should copyright law's access requirement be eliminated explicitly by permitting a jury to find copying based on the "striking" similarity of the alleged infringed and infringing works *alone*, thus adding the Fourth Circuit to the existing split among various United States Courts of Appeals on the issue?

(4) Where this Court has established rigorous standards for appellate review of alleged coercive jury instructions by a District Court, did the split Fourth Circuit panel abdicate its role by failing to provide meaningful review of such instructions?

## RULE 29.6 LISTING

Baltimore Ravens, Inc. has no parent corporations and no nonwholly owned subsidiaries.

National Football League Properties, Inc. has no parent corporations and no nonwholly owned subsidiaries.

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**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit**

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## PETITION FOR A WRIT OF CERTIORARI

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Petitioners respectfully petition for a writ of certiorari to review the opinion and judgment of the United States Court of Appeals for the Fourth Circuit herein.

## OPINIONS BELOW

The split opinion of the United States Court of Appeals for the Fourth Circuit, reported at 228 F.3d 489 (4th Cir. 2000), *amended by*, 241 F.3d 35 (4th Cir. 2001), is set forth at Petitioners' Appendix ("Pet. App.") 1a. The order of the Fourth Circuit denying Petitioners' request for rehearing *en banc* (five active Circuit Judges voting to **grant** an *en banc* rehearing and four active Circuit Judges **declining** same (one

recused)), available at No. 99-1617, 2000 U.S. App. LEXIS 33822 (4th Cir. Dec. 28, 2000), is set forth at (Pet. App. 29a). The Fourth Circuit's mandate, affirming the judgment of the District Court and awarding costs, is set forth at (Pet. App. 33a). The memorandum and order of the United States District Court for the District of Maryland is set forth at (Pet. App. 36a). The District Court's certification order, pursuant to 28 U.S.C. § 1292(b), is set forth at (Pet. App. 61a). The order of the Fourth Circuit inviting a response to the petition for permission to appeal is set forth at (Pet. App. 64a). The order of the Fourth Circuit granting the petition for permission to appeal is set forth at (Pet. App. 66a).

## STATEMENT OF JURISDICTION

The opinion of the Court of Appeals affirming the District Court's order denying petitioners' motion for judgment as a matter of law notwithstanding the verdict was entered on October 3, 2000. The order of the Court of Appeals denying Petitioners' request for rehearing *en banc* was entered on December 28, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## STATUTE INVOLVED

At issue is Section 501(b) of the Copyright Act, 17 U.S.C. §501(b)(1996), which provides in pertinent part:

> The legal or beneficial owner of an exclusive right under a copyright is entitled
>
> . . . to institute an action for any infringement of that particular right committed while he or she is the owner of it.

## INTRODUCTION

This petition calls upon the Court to resolve a deep division among the courts of appeals concerning the most basic requirements necessary to prove copyright infringement. The

split Fourth Circuit panel decision below has caused further disarray among federal trial and appellate courts in their application of fundamental principles of commonly litigated substantive areas of copyright law—specifically, the proof necessary to show a defendant's access to a plaintiff's work, and whether and under what standards access may be inferred by virtue of the mere similarity of the works. Indeed, the issues raised by both the panel majority and dissent are a source of such stark difference of opinion among members of the judiciary that five of the Fourth Circuit's ten active judges voted in favor of rehearing *en banc* and four voted against (with one recusal).

Every copyright infringement case involves the fundamental question: Did the defendant have access to the plaintiff's work? The decision below has created a rift between the circuits regarding whether it is permissible to prove such access by speculative inference. The Second, Third, Fifth, Sixth, Seventh and Eleventh Circuits explicitly prohibit the substitution of speculative inference for proof of access. The majority below, over Circuit Judge King's vigorous dissent, permits a copyright infringement plaintiff to rely solely on such inference as proof of access.

The decision below also adds the Fourth Circuit's voice to the increasingly divisive conflict among the circuits regarding whether a trial court may dispense with the access requirement entirely in cases in which the similarity between the creative works at issue is characterized, without definition, as "striking," thus abandoning the "substantial" similarity standard traditionally applied under the Copyright Act. Certain circuits, such as the Fifth Circuit, favor the wholesale abandonment of the access requirement where the works are deemed "strikingly" similar. The Fourth Circuit purports to adopt a middle ground, previously adopted by the Second Circuit, in which a "striking" similarity characterization may be used to reduce the proof necessary to show

access to a virtually unrecognizable level. The First Circuit has considered and rejected the proposition that the issue of access should rely on the wholly unrelated issue of the degree of similarity of the works at issue. Such a rejection recognizes the danger in linking these two fundamental and separate copyright issues: it establishes a state of the law in which an unscrupulous plaintiff slavishly copies a putative defendant's work—thus rendering the works "strikingly similar"—and is able to prevail on a copyright infringement claim with little or no evidence of access.

While the focus of this petition is to call for resolution of these fundamental copyright principles, petitioners also seek review of a broader issue fundamental to the gatekeeping function of any trial court, and seized upon by Judge King in his dissenting opinion below: the permissibility of inferring a fact without record support and in the face of unimpeached, contradicting evidence. In the instant case, Respondent was permitted to prove Petitioners' access to his work based on a string of four separate, necessary, unsupported and contradicted inferences. The split Fourth Circuit panel permitted such inferences to stand in direct contravention of this Court's decision in *Pennsylvania Railroad Co.* v. *Chamberlain*, 288 U.S. 333, 340-41 (1933). This error was exacerbated by the panel's failure properly to review the trial court's coercive *Allen* charges and related supplemental jury instructions, the final basis for this petition.

If allowed to stand, the conflict and disarray permeating the circuits concerning these important substantive areas of federal copyright law will lead to the proliferation of outrageous verdicts such as the one in this case. The Court should grant certiorari to resolve these conflicts.

## STATEMENT OF THE CASE

### A. STATEMENT OF FACTS

Respondent Frederick E. Bouchat ("Bouchat") filed this action, seeking $10,000,000 in damages, in the United States District Court for the District of Maryland (Northern Division), alleging that Petitioners Baltimore Ravens, Inc. ("Ravens") and National Football League Properties, Inc. ("NFLP") had infringed his copyright rights in three different drawings consisting exclusively of his original work. The jury having found for the Ravens and NFLP on two of the three drawings, notwithstanding *identical* evidence of access, only one drawing, the one supposedly copied to create the helmet logo of the Ravens, remains in issue here.

Bouchat claims he created the drawing in issue in December 1995. Tellingly, he did not file for copyright registration until seven months later, nearly two months after he saw the Ravens new helmet logo ("Shield Logo") (Pet. App. 68a) on the front page of the June 6, 1996 edition of The Baltimore Sun.

A significant number of facts necessary to provide appropriate background are set forth here. There are, however, no disputes with respect to the material facts bearing upon the important questions of federal law raised in this petition, in particular: (1) the District Court's role in permitting the jury to infer access to Bouchat's drawing from a string of baseless inferences; (2) the propriety of the "striking similarity" doctrine vitiating the need for proof of access and rebuttal proof of independent creation; and (3) the District Court's excessive coercive behavior toward the jury.

#### Parties

As his counsel repeatedly emphasized at trial, Bouchat is intellectually challenged, and went through grammar school and junior high school in a special education program. He

has no formal artistic training and has never received recognition nor been employed as a graphic designer. He worked as a security guard at the Maryland Department of Labor, Licensing and Regulation ("DLLR"), where he admitted having frequently passed time on the job tracing and sketching from comic books. Bouchat regularly displayed and/or showed his "works" to persons needing to enter or leave the building through his security checkpoint. On a single day, December 5, 1995, Bouchat claims that, while on the job, he created eleven drawings of possible "Ravens" logos for the as yet unnamed National Football League ("NFL") team that was to be relocated from Cleveland to Baltimore. One of those drawings, referred to herein as the "Shield Drawing," is central to this petition.

Petitioner Ravens has, since 1996, owned and operated a professional football team in Baltimore, Maryland. Prior to 1996, the team now known as the Ravens played professional football in Cleveland, Ohio as the Cleveland Browns ("Browns"). On November 6, 1995, the Browns publicly announced that the team would relocate to Baltimore. Approval for the move was not received until February 1996, at which time it was announced that the franchise would adopt a new team name and logos. The new name "Ravens" (but not the new logos) was announced by the team's owner on March 29, 1996.

Petitioner NFLP, the marketing arm of the NFL, provides professional graphic design services for the league's franchises. At the time of Bouchat's allegations of infringement, NFLP had in place strict policies prohibiting access by its designers to outside creative submissions. NFLP's team of career professional graphic art designers created the Ravens logos in its New York offices by drafting and refining literally dozens of different options for the team.

**Works At Issue**

Among thousands of other Baltimoreans (who voted accordingly in a public poll), Bouchat seized on the notion that Baltimore's new NFL team should be named "Ravens" and drew many renditions of what he envisioned as the Ravens logo (his "Ravens drawings").

**Bouchat's First Drawing**

The first drawing among his Ravens drawings that Bouchat claims bears any similarity to the Ravens Shield Logo is a drawing he claims to have created *in 1995* and given to a fellow worker named Lena Garrett ("Garrett Drawing") (Pet. App. 67a*). Bouchat did not register the Garrett Drawing and does not claim that he attempted to send the Garret Drawing to the Ravens or NFLP or that they had access to it.* The Garrett Drawing portrays a bird with crudely drawn head, tail feathers, and wings, in the center of which is a shield that Bouchat copied from the logo of the Maryland Bible Society, the word "Ravens," a misshapen "B" (for Batman, he claims) and a cross Bouchat copied from the Maryland state flag:




**Bouchat's Garrett Drawing (Pet. App. 67a)**

**Ravens Shield Logo**

The Ravens Shield Logo was created by NFLP graphic designers in New York during March, April and May of 1996, along with the other logos for the Ravens team. The logo released to the public on June 5, 1996, features a shield, upon which are a stylized letter "B" (to invoke Baltimore), the word "Ravens," a cross from the Maryland state flag and stylized wings extending from the sides of the shield. All of these features are tied to the Ravens' plan to create a logo with a hometown stamp:




**Ravens Shield Logo (Pet. App. 68a)**

At trial, NFLP's graphic designers retraced each of the steps leading to their independent creation of the Ravens Shield Logo, beginning with research materials compiled and sketches created prior to March 29, 1996, *before* the date that Bouchat claims to have forwarded his Shield Drawing—April 1 or 2, 1996, (*see infra*).

**Bouchat's Shield Drawing**

On July 25, 1996, nearly two months *after* Bouchat saw the Ravens Shield Logo depicted above in The Baltimore Sun, he filed for a copyright registration for the following drawing:




**Bouchat's Shield Drawing (Pet. App. 69a)**

The primary (but by no means only) difference between Bouchat's earlier Garrett Drawing and his later Shield Drawing is that the wings have been altered considerably from the Garrett Drawing and now bear a strong similarity to the wings on the Ravens Shield Logo that Bouchat saw in June 1996. In addition, all of the other elements of Bouchat's work—including the "B," the cross, the shield shape, the word "Ravens" and the shading of the logo—are more refined and more closely resemble Petitioners' work. The District Court itself noted that the wings on Bouchat's Shield Drawing reflected a much higher level of artistic skill and vision than the other elements of that drawing: "when you look at [Bouchat's Shield Drawing], there is a difference in style between the feathers at the bottom and the wing. There's a difference in quality. The wings gets [sic] an A, and the bottom gets something else." (Pet. App. 73a.)

Therefore, even if Bouchat is credited with having created the Garrett Drawing before he saw the Ravens Shield Logo, it appears that, upon subsequently seeing that logo, Bouchat employed his regular practice of mimicking other works by changing the wings and other features of the Garrett Drawing to produce the Shield Drawing, which very closely resembles the Ravens Shield Logo. The Shield Drawing is the drawing he copyrighted and claims was infringed. It is undisputed that if Bouchat had changed the wings in June, 1996—after he saw the Ravens Shield Logo—then Bouchat could *not* have sent his Shield Drawing to the MSA in April, 1996, as he claimed, and thus could not prove access.

As will be shown *infra*, Bouchat lacked proof of *access* by NFLP's creative team to his Shield Drawing. At trial, however, to compensate for such lack, Bouchat produced evidence of *priority of creation*, selecting several witnesses from among the many who passed by his security post and saw his numerous Ravens drawings and other works on display. Asked to recall their observations of Bouchat's workstation displays in 1995 and 1996 at trial in 1998, some of the selected witnesses testified that they saw *either* Bouchat's Garrett Drawing or Shield Drawing, or both, *before* they saw the Ravens Shield Logo.

Having received identical evidence of access on all three of the works Bouchat claimed were infringed, and after telling the District Court several times over several days that they could not reach a verdict, but being admonished to continue nonetheless, (see coercion discussion *infra*), the jury finally returned a split verdict, for NFLP and the Ravens on two of the three works, but for Bouchat on the Shield Drawing/Shield Logo claim. Subsequently, the appeal process that now reaches this Court was commenced.

**No Proof of Access**

Bouchat's evidence of access consisted of the classic "tortuous chain of hypotheticals" that district courts usually

discard. His hypothesis is that he faxed his drawings (his Shield Drawing among them) to the Maryland Stadium Authority ("MSA"), which delivered them several blocks away to John Moag's ("Moag") law firm, which routed them to Moag, who delivered them to the Ravens, which sent them to NFLP in New York, which distributed them to the NFLP Design team, which copied them to create the Ravens Shield Logo. Bouchat has produced no direct or circumstantial proof to support these inferences. Here is his "proof":

**Inference 1 (Bouchat to MSA):** Bouchat claimed to have faxed his three drawings on April 1 or 2, 1996, (Pet. App. 70a), to the MSA—an organization completely independent of the Ravens that operates essentially as the Ravens' landlord for the stadium.[1] However, no one witnessed Bouchat sending the fax (the first time in his life that he had ever used a fax machine), and no fax confirmation or phone records confirming fax transmission were produced at trial. There was also no evidence that the MSA ever received the fax. Indeed, the MSA's deputy director testified that, based on interviews he had conducted, no MSA employee ever saw the alleged fax. As the dissenting opinion notes, "[e]ven the jury was not fully convinced" that Bouchat had sent the Shield Drawing, "as evidenced by their simultaneous and inconsistent verdict that he failed to prove that he had faxed two other drawings along with the shield drawing." (Pet. App. 15a n.2 (King, C.J., dissenting).)

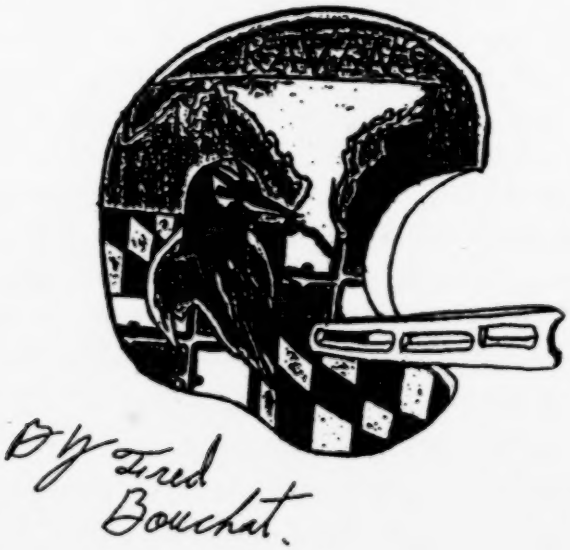
**Inference 2 (MSA to Moag):** Moag, the volunteer chairman of the MSA, worked out of his law firm's offices on Pratt Street—a separate building several blocks from the MSA's offices. The MSA's standard practice was to send documents and faxes actually received and addressed to Moag to his law firm by messenger. However, Moag, (Pet.

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[1] It is not disputed that the MSA had no role whatsoever in the design of the Ravens logos or any other such team creative or naming matters.

App. 76a), his secretary and the law firm's office manager all testified unequivocally that they never saw nor received the alleged fax of Bouchat's Shield Drawing, (Pet. App. 69a), or any other drawings from Bouchat. Moag's secretary further testified that her practice was to place every outside submission into a file created for that purpose, and that the alleged fax of the Shield Drawing, or any other Bouchat drawing, was not in that file.

Moag testified that he never passed any of Bouchat's drawings on to the Ravens or NFLP. Moag did meet with Bouchat once for a brief photo session on March 28, 1996 as a favor to DLLR for an article about Bouchat in its employee newsletter. (Pet. App. 76a-78a.) During this photo session Bouchat showed Moag the following *miniature helmet* drawing:




**Drawing on Bouchat's Helmet (Pet. App. 71a)**

It is obvious and undisputed that the drawing on the miniature helmet is wholly unlike the Ravens Shield Logo at issue.

**Inference 3 (Moag to Ravens):** For a period of weeks, the Ravens rented office space owned by and adjoining Moag's law firm, but located on a different floor. Moag testified that he never forwarded any fax from Bouchat to the Ravens and that his specific stated policy, known to his secretary, was that no outside submissions should ever be forwarded to the Ravens, (Pet. App. 75a-76a). In addition, the Ravens employees at Pratt Street testified that they never received nor viewed the Bouchat Shield Drawing or any other design by Bouchat.

**Inference 4 (Ravens to NFLP):** Despite the fact that Ravens' owner David Modell ("Modell") testified he never saw Bouchat's work, Bouchat asked the jury to speculate that Modell, whose office was in Baltimore, functioned as a requisite third-party intermediary to NFLP in New York for access purposes. Bouchat produced no evidence that Modell or the Ravens ever forwarded the Shield Drawing to NFLP. At trial, (1) Modell and other Ravens employees testified that they never sent any material containing creative work to NFLP; (2) David Cope, the Ravens marketing vice-president in charge of handling outside submissions, testified that, several weeks prior to the alleged submission, he instituted and made known to all Ravens employees a policy that all outside submissions of creative work were to be returned to the sender; (3) the office manager at the Pratt Street location testified that the telephone records establish that no faxes, other than one memorandum having nothing to do with the logo creation, were sent from the Ravens offices to NFLP in New York during the relevant time period; (4) Paula Guibault, NFLP's senior intellectual property counsel, testified that the alleged fax was not received by NFLP, and that NFLP strictly enforced its written policy of isolating the designers from receipt of outside submissions; and (5) all of the NFLP designers on the Ravens project testified that they never received nor viewed the alleged fax.

Respondent's claim of access thus relied upon four separate and independently necessary inferences, each of which is unsupported by any direct proof and directly contradicted by unimpeached testimony. Such is the basis for the vigorous dissenting opinion of Judge King in the Fourth Circuit that the verdict was "entirely without legal or factual support" and that judgment should be entered for Petitioners. (Pet. App. 12a (King, C.J. dissenting).) Through this unsupported chain of inferences the District Court permitted the jury not only to disregard Bouchat's failure of proof of access—a requisite element to any copyright infringement claim—but also to ignore the voluminous, detailed evidence of Petitioners' independent creation of the Ravens logos, which Bouchat bore the burden of disproving, *see Keeler Brass Co.* v. *Continental Brass Co.*, 862 F.2d 1063, 1066 (4th Cir, 1988).

**Proof of Independent Creation**

NFLP's designers explained at trial their development of the Ravens logos, from initial concepts to final designs, by referring to hundreds of computer designs, all contemporaneously created at NFLP, and by recreating in the courtroom on computers the process of developing the logos. The design team testified that its initial research for the design of the Ravens logos included a logo design created by Kurt Osaki ("Osaki") in 1993 for the Baltimore Bombers (then a possible NFL expansion franchise name), which incorporated shields and wings. As early as February of 1996, Rhonda Kim ("Kim") began to collect information on Baltimore and Maryland, including information regarding the state seal, and the state flag which contains the Greek cross. On March 22, 1996, NFLP vice president and creative director Bruce Burke ("Burke") learned that "Ravens" would likely be the name of the new Baltimore team and so informed Kim, who began to draw freehand sketches of preliminary Ravens logo designs, which included shields and wings. As reflected in her diary,

Kim recalls doing her initial sketches on March 25-27, several days before the name of the team was officially announced on March 29, 1996.

Petitioners' experts testified consistently that (1) NFLP's work product indicated a logical, identifiable progression of the independent creation of the Ravens logos; and (2) *if* any copying occurred, it was Bouchat who copied from Petitioners after the Ravens Shield Logo was published in June 1996, but before he registered the Shield Drawing. In contrast to the grounded opinions of these experts and in a desperate attempt to denigrate the hard evidence of NFLP's independent creation, Bouchat proffered the outrageous testimony of his "art" expert, Robert Anders ("Anders") (admittedly not a social scientist), who swore as "a factual statement" that Asians have a propensity to copy. (Two of NFLP's designers, Kim and Osaki, are of Asian descent.) [2] Anders himself conceded that there was an identifiable process and development of the Ravens logos by the NFLP designers from initial sketches through to final designs for presentation. He specifically admitted that if the sketches drawn by Kim between March 22 and March 29, 1996 had been made prior to seeing Bouchat's drawings (sent at the earliest on April 1, 1996 at about 7:00 p.m.), then he would change his opinion as an expert and conclude that NFLP did not copy Bouchat's Shield Drawing.

In contrast to the voluminous evidence demonstrating the detailed progression of NFLP's independent creation of the Ravens logos, Bouchat put forth no evidence at trial regarding his process of developing his Ravens drawings. Bouchat testified at trial that his primary method of drawing is to (1) copy drawings others create professionally, such as from

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[2] The District Court instructed the jury to disregard Anders' testimony on this subject, (Pet. App. 83a), but its prejudicial effect remains unknowable.

comic books; (2) make extremely minor changes, if any, to such drawings; (3) change the name of the character copied; and then (4) claim, by applying his signature, that the drawing is original to him. Bouchat's own testimony establishes that he is unable (or unwilling) to distinguish between a direct copy of the work of another (his primary method of drawing) and an original drawing. On the basis of a review of Bouchat's other art works, Petitioners' art experts testified unequivocally that Bouchat did not have the ability to conceptualize or create his Shield Drawing without copying from another source, most likely NFLP's works.

**Jury Instructions and Deliberations**

Over Petitioners' objection, the District Court elected to instruct the jury on both "striking" and "substantial" similarity, without adequate explanation as to the difference in meaning of those terms. The confusing instructions were in combination with Bouchat's improper reliance on "striking" similarity to compensate for the absence of proof of access and rebuttal proof of independent creation. For example, since Bouchat produced no fax receipts, his counsel in closing argument stated: "How do we know the fax went through . . . . We know because of this [pointing to large side-by-side cardboard blow-ups of the Shield Logo and Shield Drawing], and you can infer from the striking similarity that it did get through . . . there [pointing] is the transmission receipt." (Pet. App. 84a.)

The jury's notes to the court reflect the misperceptions created by the verdict form and the charge. After a full day and a half of deliberation, the jury advised the court by note that it was unable to reach a verdict. The court convened the jury and read them a version of the "Allen" charge. (Pet. App. 87a-90a.) Included in the Allen charge were repeated references to "waste[d]" time and effort and a reference to the desirability of "closure."

After approximately another half day of deliberations, the jury sent a note to the court, unequivocally setting forth yet again its failure to reach a unanimous verdict and the futility of further efforts. (Pet. App. 91a.) This note plainly indicated that the jury was split and that there was difficulty with a particular instruction. At variance with the court's prior statement in the Allen charge that there would be only *one* final effort, the court reconvened the jury and exhorted it, again, to reach a verdict, emphasizing the grave importance of the case to the parties and to the court. (Pet. App. 93a-95a.) The court's supplemental instruction, a direct response to the most recent note, was essentially highlighting the split and the particular issue. Finally, the District Court, over objection from Petitioners' counsel, fixed the time for the jury to report back.

The verdict resulted directly from the trial court's complete failure to exercise its fundamental role of evidentiary gatekeeper, followed by its insistence that the jury reach a verdict. If left unaddressed, such abdication of responsibility will reverberate and persist far beyond this single copyright matter and will have significant ramifications for all trials, not simply this one case where the jury clearly was influenced to go awry.

## B. PROCEEDINGS BELOW

Petitioners moved for judgment as a matter of law notwithstanding the verdict or, in the alternative, for a new trial. The District Court, by order, (Pet. App. 36a), denied Petitioners' motion, but certified the questions raised herein for interlocutory appeal, (Pet. App. 61a). In a 2-1 decision with a lengthy and emphatic dissent, the Fourth Circuit affirmed the District Court's order. (Pet. App. 1a.) The Court of Appeals subsequently denied Petitioners' petition for

rehearing *en banc*, despite a 5-4 vote in favor of rehearing,[3] (Pet. App. 29a).

**Jurisdiction**

The District Court has federal question jurisdiction over this case pursuant to 28 U.S.C. § 1331, as it arises under the Copyright Act, 17 U.S.C. § 501. The Court of Appeals has jurisdiction over the appeal pursuant to 28 U.S.C. § 1292(b), as it is taken from an interlocutory order issued by the District Court, (Pet. App. 61a), and the Fourth Circuit granted permission to appeal, (Pet. App. 66a).

## REASONS FOR GRANTING THE WRIT

If left unreviewed by this Court, the Fourth Circuit decision eradicates the duty of district courts to filter out cases that are based solely on a string of irrational inferences. In copyright cases specifically, no defendant can erect protective barriers of sufficient fortitude against outside creative submissions so as to withstand jury review. Further, as here, when a plaintiff brazenly creates a work so as to approximate closely the defendant's, there will no longer be a need to build evidence of access, irrational or not: the jury can infer every element of proof from "striking" similarity alone.

This case is of the utmost importance for four fundamental reasons. First, the Fourth Circuit's ruling violates this Court's decisions and contradicts decisions of virtually every other circuit regulating the use of inferences at trial. Second, the split Fourth Circuit panel decision directly conflicts with decisions of the Second, Third, Fifth, Sixth, Seventh and Eleventh Circuits, requiring that proof of access in a

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[3] Because one active Circuit Court Judge was disqualified, only nine active judges participated in the review process. Thus, under the Local Rules, the requisite "majority" of the appellate court's ten active judges was not achieved, notwithstanding a majority of voting judges for rehearing. *See* Fourth Circuit Local Rule 35(b).

copyright case cannot be based upon speculative inference alone. Third, the panel decision exacerbates the existing circuit split regarding whether a trial court may permit a copyright plaintiff to dispense altogether with the requirements of proving access and rebutting unimpeached evidence of independent creation in cases where the works are characterized as "strikingly," as opposed to "substantially," similar. Fourth, the panel's failure to undertake close review of the jury instructions and actions of the District Court constituting coercion imperils the fundamental constitutional guarantee of a fair trial.

## A. THE DECISION OF THE FOURTH CIRCUIT VIOLATES THIS COURT'S PRECEDENT REQUIRING REASONABLENESS IN THE USE OF INFERENCES

The majority panel opinion of the Fourth Circuit is in direct contravention of the Supreme Court's holding in *Pennsylvania Railroad Co.* v. *Chamberlain*, 288 U.S. 333, 340-41 (1933), that it is not permissible to infer a fact "in the face of the positive and otherwise uncontradicted testimony of unimpeached witnesses." In this regard, the Fourth Circuit's opinion also conflicts with the established law of other circuits, which have adhered to the Supreme Court's decision in *Chamberlain* and stringently sought to ensure that jury verdicts be possessed of sound evidentiary bases.[4] *See Dessi* v. *Pa. R.R. Co.*, 251 F.2d 149, 150 (3d Cir. 1958);

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[4] For an inference to be legally sound, it must be reasonable. *See Epoch Producing Corp.* v. *Killiam Shows, Inc.*, 522 F.2d 737, 744-45 (2d Cir. 1975), *cert. denied*, 424 U.S. 955 (1976); *see also Sylvia Dev. Corp.* v. *Calvert County, Md.*, 48 F.3d 810, 818 (4th Cir. 1995) (Court considers only inferences that are "reasonable" from the evidence presented); *Thompson Everett, Inc.* v. *Nat'l Cable Adver., L.P.*, 57 F.3d 1317, 1323 (4th Cir. 1995) ("[I]nferences must, in every case, fall within the range of reasonable probability and not be so tenuous as to amount to speculation or conjecture.").

*Sickles* v. *Graybar Elec. Co.*, 219 F.2d 847, 854 (7th Cir. 1955); *see also Humphrey* v. *Southwestern Portland Cement Co.*, 488 F.2d 691, 695 (5th Cir. 1974) (quoting *Chamberlain* in non-jury context). Contrary to the Fourth Circuit's opinion, the jurisprudence of the Second, Third, Fifth, Six, Seventh, Eighth and Eleventh Circuits forbids juries in all cases to find facts based on "a chain of unsupported and fanciful inferences." (Pet. App. 24a (King, C.J., dissenting).)

The four separate, independently necessary and contradicted inferences that the District Court permitted the jury to employ here fell far short of any standard of reasonableness. As recognized by Judge King in his vigorous dissent, "[i]n this case, the endless piling of unsupported and contradicted inference upon inference upon inference rises to the level of absurdity." (Pet. App. 22a (King, C.J., dissenting).)

The superimposing of successive inferences to prove the existence of an ultimate fact (here, access) severely undermines its likelihood. *See Salter* v. *Westra*, 904 F.2d 1517, 1525 (11th Cir. 1990) ("When inferences are built upon inferences, the probability of the last or ultimate inference is attenuated by each underlying inference."); *Cora Pub, Inc.* v. *Continental Cas. Co.*, 619 F.2d 482, 486 (5th Cir. 1980) (each additional inferential layer may undercut the probability of the final inference); *see also Parker* v. *Gulf Ref. Co.*, 80 F.2d 795, 796 (6th Cir. 1936) (pyramiding of conjectural inferences is insufficient proof). It is the duty of district courts to ensure that such speculative proof, if permitted to reach the jury at all, not form the basis of a verdict.[5] *See*

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[5] In allowing the jury to "ground" its factual findings on such speculative, inferential proof, the District Court abdicated its proper role as gatekeeper. The District Court's gatekeeping function of permitting *facts* to be found only upon reasonable evidence, not speculative inference, is commensurate to its obligation, recently clarified by this

*Sylvia Dev. Corp.*, 48 F.3d at 818 ("[p]ermissible inferences must . . . be within the range of reasonable probability . . . and it is the duty of the court to withdraw the case from the jury when the necessary inference is so tenuous that it rests merely upon speculation and conjecture" (quoting *Ford Motor Co.* v. *McDavid*, 259 F.2d 261, 266 (4th Cir. 1958))).

Given the outcome here and its ramifications for content creators generally, as well as for all parties in all jury trials, clarification of the District Court's role is urgently required.

### B. THE FOURTH CIRCUIT'S OPINION IMPLICITLY ELIMINATES COPYRIGHT LAW'S ACCESS REQUIREMENT AND CREATES A CONFLICT OF LAW AMONG THE COURTS OF APPEALS BY PERMITTING CLAIMS OF COPYING BASED ON SPECULATIVE INFERENCES ALONE

The Fourth Circuit's endorsement of a plaintiff's reliance on a sequence of unsupported and contradicted inferences to establish access threatens the consistent application of copyright law nationwide. The majority opinion contradicts controlling law of the Second and Seventh Circuits, which rejects proof of access by speculation alone. *See Gaste* v. *Kaiserman*, 863 F.2d 1061, 1066 (2d Cir. 1988) ("[a]ccess must be more than a bare possibility and may not be inferred through speculation or conjecture"); *Selle* v. *Gibb*, 741 F.2d 896, 901 (7th Cir. 1984) ("[P]laintiff must always present sufficient evidence to support a reasonable possibility of access because the jury cannot draw an inference of access based upon speculation and conjecture alone"); *see also Towler* v. *Sayles*, 76 F.3d 579, 581-83 (4th Cir. 1996) (holding (1) "mere possibility" of access insufficient to prove

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Court, to permit only rationally grounded *opinion* testimony. *See Kumho Tire Co.* v. *Carmichael*, 526 U.S. 137 (1999).

copyright infringement; (2) copyright plaintiff must present more than "tortious chain of hypothetical transmittals"; and (3) plaintiff must put forth concrete evidence supporting inference that defendant received work in question). The dissenting opinion criticizes the majority for "casting aside [] the substance of [Fourth Circuit precedential authority in] *Towler*," (Pet. App. 14a (King, C.J., dissenting)), which, consistent with decisions of other courts of appeals, prohibited proof of access based on mere speculation.

As the dissent of Judge King warns, the effect of the majority decision of the panel will be to adopt a rule that proof of access by corporate defendants to unsolicited, outside submissions may be established by nothing more than the "thin reed" of bare corporate receipt. (Pet. App. 19a (King, C.J., dissenting).) Other courts have prohibited the use of "bare corporate receipt" to prove access so as to prevent the "dizzying array of meritless copyright claims" such use engenders. *See Meta-Film Assocs.* v. *MCA, Inc.*, 586 F. Supp. 1346, 1355-57 (C.D. Cal. 1984) (mere fact of common corporate employer—hence common office space—cannot overcome specific facts showing attenuated link between relevant individuals). Here, however, the Fourth Circuit's decision goes beyond even the untenable "bare corporate receipt" scenario, because Bouchat did not even claim to have sent his sketch to the defendant corporate employers, the Ravens or NFLP, or even to any qualified intermediaries.

A significant, and practical, danger resulting from the Fourth Circuit's decision is that no organization, not just popular sports teams, will be able to bar copyright infringement claims made by brazen imitator plaintiffs who copy the company's work after it is made public. By eliminating the requirement of reasonableness in inferring access, the access requirement is now unsettled, varying dramatically among the Circuit Courts of Appeals, and causing the absence of a nationwide standard for proof of access under the Copyright Act.

## C. THE FOURTH CIRCUIT'S OPINION EXPLICITLY ELIMINATES COPYRIGHT LAW'S ACCESS REQUIREMENT, AND THE REQUIREMENT THAT PROOF OF INDEPENDENT CREATION BE REBUTTED, BY ADOPTING AN UNDEFINED "STRIKING" SIMILARITY STANDARD

Having *implicitly* eliminated the requirement of access in every copyright case by allowing a series of contradicted inferences based solely on conjecture to substitute for access, the Fourth Circuit majority then *explicitly* eliminated the access requirement in cases where the works are "strikingly similar," holding that "striking similarity is one way to demonstrate access." (Pet. App. 8a.) For sound reasons, the First Circuit has considered and rejected any linkage between access and the degree of similarity of the works at issue, *see Grubb* v. *KMS Patriots, L.P.*, 88 F.3d 1, 5 (1st Cir. 1996), and the "striking similarity" standard has been adopted wholesale only in a minority of circuits that have considered it.[6] It has never heretofore been adopted by the Fourth Circuit. In the only previous case in which the Fourth Circuit considered the "striking similarity" doctrine, it affirmed, by unpublished opinion, a district court's *rejection* of the doctrine. *Takeall* v. *Pepsico, Inc.*, 809 F. Supp. 19, 22-23 (D. Md. 1992), *aff'd*, No. 93-1237, 1993 WL 509876 (4th Cir. Dec. 8, 1993) (unpublished opinion).

Under the standard articulated by the Fourth Circuit in this case, a jury may find for plaintiff solely on the "striking"[7]

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[6] *See, e.g., Peel & Co., Inc.* v. *Rug Mkt.*, 238 F.3d 391, 394-95 (5th Cir. 2001); *Three Boys Music Corp.* v. *Bolton*, 212 F.3d 477, 485 (9th Cir. 2000), *cert. denied*, 121 S.Ct. 881 (2001); *Herzog* v. *Castle Rock Entm't*, 193 F.3d 1241, 1248 (11th Cir. 1999).

[7] We have found no decision providing a substantive definition of when a work qualifies as "strikingly," as opposed to merely "substantially," similar. Applying this undefined label predetermines the

similarity of the works at issue, regardless of the absence of evidence of access. A copyright infringement plaintiff who slavishly copies a corporate defendant's logo (thus rendering the two logos "strikingly" similar) and claims to have submitted that logo to an unrelated third party by an unconfirmed fax, now has the right to test his luck before a jury.

As the dissenting opinion discusses at length, the "striking similarity" standard also "runs contrary to a fundamental principle of copyright protection: independent creation." (Pet. App. 27a (King, C.J., dissenting).) Notably, in the instant case there is voluminous, uncontradicted and unimpeached evidence in the record that NFLP independently created the Ravens logos and, as discussed above, a strong possibility that Bouchat copied the Ravens Shield Logo after it was released publicly. The jury was allowed to disregard these hard facts and common sense realities.

As characterized by the dissent, "[s]uch an absurd result illustrates why the requirement of proving substantial similarity should remain independent of the requirement of demonstrating access," (Pet. App. 27a-28a (King, C.J., dissenting)); *see also Grubb*, 88 F.3d at 5-6. Permitting the vague and undefined concept of "striking" similarity to replace time-honored legal elements of a claim of copyright infringement will dilute the objective of having uniform, measurable standards in the application of a national copyright law.

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outcome of a fundamental requirement of this Court, and others, regarding basic proof of access and rebuttal of proof of independent creation. Thus, any jury can simply adopt a label and impose its own view of the standard of proof to be applied in a given case.

## D. THE FOURTH CIRCUIT'S DECISION FAILS PROPERLY TO REVIEW THE DISTRICT COURT'S COERCIVE SUPPLEMENTAL JURY INSTRUCTIONS

During more than three full days of deliberation, the jury twice informed the trial judge that it was deadlocked and that further deliberations would not be fruitful. Over Petitioners' objections, the trial judge twice issued supplemental instructions that went beyond the bounds of an *Allen* charge. The instructions included the improper admonition that the judge did not want to have "wasted" everyone's time should the jury not arrive at a verdict. The coercive nature of the charges was increased by the addition of time constraints and the trial judge's knowledge at the time that the jurors were hung.

Despite such strong evidence of jury coercion,[8] the Court of Appeals merely rubber-stamped the District Court's own characterization of its instructions as "fair and balanced" without consideration of the individual coercive elements of the supplemental charges and the time constraints imposed by the District Court. (*See* Pet. App. 11a.) Such a cursory review violates the basic principle that supplemental jury instructions, because they are viewed with skepticism, be carefully analyzed in the context of all the surrounding circumstances, *see Lowenfield* v. *Phelps*, 484 U.S. 231, 237 (1988); *United States* v. *United States Gypsum Co.*, 438 U.S. 422, 459-62 (1978); *Jenkins* v. *United States*, 380 U.S. 445, 446 (1965) (*per curiam*), and reversed if found to be coercive, *see United States* v. *Lindell*, 881 F.2d 1313, 1321 (5th Cir. 1989) (appellate court "must scrutinize" a supplemental

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[8] Indeed, there is evidence that the verdict was a compromise given the jury's inconsistent finding of no access as to two of the three drawings that Bouchat claimed to have sent simultaneously. (*See* Pet. App. 15a n.2 (King, C.J., dissenting).)

charge's deviance from approved *Allen* language and its coercive nature); *see also United States* v. *Burgos*, 55 F. 3d 933, 941 (4th Cir. 1995) ("It is critical that an Allen charge not coerce one side or the other into changing its position for the sake of unanimity. Judges wield substantial influence over jurors . . . . Failure to provide a sufficiently balanced charge will result in reversal.").

The Fourth Circuit's failure properly to review the coercive elements of the trial court's two supplemental charges and the imposed time restraints vitiates well-developed limitations on *Allen* charges. The threat posed by the decision of the Court of Appeals extends to all trials.

## CONCLUSION

This case provides an opportunity for the Court to reestablish its own important precedents and to create a uniform standard in a crucial area of national copyright law now dividing the circuits. Therefore, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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Dated: March 27, 2001

# APPENDICES

# APPENDIX A

[As Amended January 17, 2001]

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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No. 99-1617

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FREDERICK E. BOUCHAT,
*Plaintiff-Appellee*,

v.

BALTIMORE RAVENS, INCORPORATED; NATIONAL FOOTBALL LEAGUE PROPERTIES, INCORPORATED,
*Defendants-Appellants*.

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March 3, 2000, Argued
October 3, 2000, Decided

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Before WIDENER and KING, Circuit Judges, and James H. MICHAEL, Jr., Senior United States District Judge for the Western District of Virginia, sitting by designation. Senior Judge Michael wrote the opinion, in which Judge Widener joined. Judge King wrote a dissenting opinion.

## OPINION

MICHAEL, Senior District Judge:

Frederick E. Bouchat (the "plaintiff-appellee") filed this action, seeking $10,000,000 in damages, in the United States District Court for the District of Maryland, alleging that the Baltimore Ravens, Inc. and National Football League Properties, Inc. (the "defendants-appellants") had infringed his copyright rights in three different drawings consisting entirely of his original work, including a shield drawing

created by Bouchat in late 1995 when developing his "shield logo" for the new National Football League team—the Baltimore Ravens. Bouchat holds a copyright on his shield drawing and claims that the defendants' designers copied protected elements of that drawing. The defendants claim that they developed the Baltimore Ravens' official shield logo independently. The case was tried before a jury over nearly five weeks in October and November 1998. The jury returned a verdict in favor of Bouchat. The defendants filed a motion for judgment as a matter of law notwithstanding the verdict or, in the alternative, for a new trial as to the third drawing, contending—among other things—that the plaintiff failed to prove that the defendants had access to Bouchat's drawing. The district court, by order, denied defendants' motion in February of 1999. In April 1999, however, the District Court certified several questions to this court which form the basis of this interlocutory appeal. Based upon the reasoning below, this court affirms the decision of the district court.

I.

Frederick Bouchat is an amateur artist. He has a ninth grade education, and now works as a front entrance security guard at the State of Maryland Office building on St. Paul Street in Baltimore. Bouchat often showed his artwork to people passing through the building's main entrance.

As news of an NFL team for Baltimore spread in 1995, Bouchat created drawings and designs for the team based on his favorite possible team name—the Ravens. Bouchat created a helmet design and affixed his creation to a miniature football helmet. Bouchat gave the design and helmet to Eugene Conti, a state official who worked in the St. Paul Street office building. Conti kept the helmet displayed in his office. Bouchat showed other team drawings to employees of the building, and gave two drawings away as holiday gifts in December of 1995.

Conti asked a colleague to arrange a meeting between Bouchat (an enthusiastic Baltimore fan) and John Moag, chairman of the Maryland Stadium Authority (the man who brought the team to Baltimore) in order to include a story about Bouchat in the employee newsletter. On March 28, 1996, Bouchat was taken to meet Moag at Moag's law office on Pratt Street. The Ravens, and David Modell (the team's owner) occupied the same office suite in the Pratt Street building as a temporary space at this time.

At the meeting, photos were taken and Moag told Bouchat that the team was going to be named the Ravens. When Bouchat described his drawings, Moag told Bouchat to send his drawings along, and Moag would give them to the Ravens for consideration. The next day, Bouchat got permission from his supervisor to use the office fax machine in order to send his drawings to Moag at the Maryland Stadium Authority (MSA). Jan Drabeck, Bouchat's immediate supervisor, showed Bouchat how to use the fax machine.

On April 1 or 2, 1996, Bouchat faxed his drawings to the MSA. He received a fax confirmation but did not retain the printed confirmation receipt. One of the drawings Bouchat faxed to the MSA was his shield drawing.

On April 2, 1996, Modell met with the NFL Properties Design Director to discuss the development of a Ravens logo. Thereafter, Modell communicated with the design team concerning the logo project. The Ravens unveiled their new logo in June of 1996. The new Ravens logo was a Raven holding a shield.

Bouchat and several of his co-workers immediately recognized the new logo as Bouchat's work. Bouchat contacted a lawyer, and in August of 1996 he obtained copyright registration for his shield drawing. In May of 1997 Bouchat filed this lawsuit against the Ravens and NFL Properties for infringing his copyright on the design at issue.

In November of 1998, the jury returned a verdict in favor of the plaintiff, but only as to his shield drawing.[1] Defendants filed a motion for judgment as a matter of law which the district court denied. The district court then certified the following questions for interlocutory appeal: (1) Was the plaintiff's proof of a reasonable possibility of access legally insufficient? (2) If so, will the Fourth Circuit adopt the "strikingly similar" doctrine inferring access, as expressed in *Gaste v. Kaiserman*, 863 F.2d 1061, 1068 (2d Cir. 1988)? (3) Should the copyright infringement claim be dismissed because the plaintiff failed to note the derivative nature of the shield drawing on the application for copyright, where defendants have not proven fraud or a purposeful failure to advise the copyright office of facts that might have caused rejection of the application? (4) Did the court improperly coerce the jury to reach its verdict? These four questions are the basis for the defendants' interlocutory appeal.

II.

To prove copyright infringement, a plaintiff must show first that he owned the copyright to the work that was allegedly copied, and second, that the defendant copied protected elements of the work. *See Towler v. Sayles*, 76 F.3d 579, 581 (4th Cir. 1996) (citing *Feist Publications, Inc. v. Rural Telephone Service Co.*, 499 U.S. 340, 361, 113 L. Ed. 2d 358, 111 S. Ct. 1282 (1991)). Where direct evidence of copying is lacking, plaintiff may prove copying by circumstantial evidence in the form of proof that the alleged infringer had access to the work and that the supposed copy is substantially similar to the author's original work. *See Towler*, 76 F.3d at 581-82. Defendants contend that Bouchat did not establish access. To prove access, Bouchat was

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[1] Bouchat claimed copyright infringement as to three drawings, but only won a favorable verdict as to the shield drawing. Only the verdict as to the shield drawing is challenged on appeal.

required to show that the NFL designers, the alleged infringers, had an opportunity to view Bouchat's drawing. *See id.* at 582. The jury was entitled to infer that the NFL designers had access if a third party intermediary (Modell) with a close relationship to the alleged infringers (the NFL designers) had access. *See id.* at 583. This court, however, has rejected mere "speculative reasoning" as a basis for proving access, especially when intermediaries are involved. *Id.* Reasoning that amounts to nothing more than a "tortuous chain of hypothetical transmittals" is insufficient to infer access. *Id.* at 583 (quoting *Meta-Film Assoc., Inc. v. MCA, Inc.*, 586 F. Supp. 1346, 1355 (C.D. Cal. 1984)).

Defendants, in denying actual receipt of Bouchat's faxed drawings, claim that Bouchat's proof amounts only to a "tortuous chain of hypothetical transmittals" and therefore is legally insufficient to prove access. Defendants' argument is not persuasive. In *Towler*, the plaintiff relied on the theoretical possibility that agents to whom she had sent her screenplay "could have sent the work to" the alleged infringer. *Id.* There was no evidence that the agents had sent the work to the defendant, only the plaintiff's suggestion that such a transmittal was hypothetically possible. This, the Fourth Circuit concluded, was not adequate proof of access. *See id.*

Bouchat offered evidence that his shield drawing was transmitted first to Moag, who shared an office with Modell (who had a close relationship with the alleged infringers on the design project). Bouchat testified that Moag offered to forward his (Bouchat's) drawings to the Ravens and that Bouchat sent the fax of the drawings to MSA, addressed to Moag. The jury was entitled to credit that testimony. Evidence was also introduced that the regular practice at the MSA was to forward faxes for Moag to his Pratt Street office. The jury was thus entitled to conclude that the faxed drawing reached Moag at the Pratt Street office. Defendants admit that

Modell and other Ravens staff shared office space with Moag in the Pratt Street building, and that Modell's own office was within "earshot" of Moag's office. By proving that the drawings were transmitted to Moag, and that Modell shared the same office space with Moag, Bouchat proved that Modell had "access" to Bouchat's drawing. The chain of transmittals is far more than hypothetical—it is based on the testimony of Bouchat and the evidence regarding standard office routines at the MSA. *See* Fed. R. Evid. 406.

The defendants successfully argue that Bouchat did not prove that Modell actually saw Bouchat's drawings. However, Bouchat was not required to prove that Modell in fact saw the drawings and copied them. Rather, Bouchat was merely required to prove that Modell had access to the drawings by showing Modell had the opportunity to view them. *See Towler*, 76 F.3d at 582. Bouchat clearly presented sufficient evidence to sustain that burden. Having concluded that Modell had access to the drawings, the jury was able to combine that conclusion with the substantial similarity between the Raven's logo and Bouchat's drawing to find, ultimately, that the Ravens copied Bouchat's copyrighted work.

The district court, in its memorandum opinion, speculates that the fax addressed to Moag might have been misdelivered to Modell himself, since Modell's name appeared in the message written on the fax and since the fax featured a large raven, concerning which Modell would obviously be the interested party. Bouchat's evidence is sufficient to demonstrate access even if we do not posit any fortuitous misdelivery of the fax. A copyright infringement plaintiff need not prove that the infringer actually saw the work in question; it is enough to prove that the infringer (or his intermediary) had the mere opportunity to see the work and that the subsequent material produced is substantially similar to the work. *See id.* Adequate evidence of the infringer's or

the intermediary's opportunity to see the work exists and therefore Bouchat's proof of access is legally sufficient to sustain the jury's verdict in his favor.[A1]

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A1






Plaintiff's Drawing The Accused Work

A copy of the plaintiff's shield logo and the accused work of the NFL Properties is shown above. There is no dispute as to the similarity of the works, not only because the similarity is facially indisputable, but the defendants' expert witness testified, and the plaintiff's expert agreed, that the designs are so similar that they could not have been created independently from one another. The dissent notes that "it is just as likely that Bouchat copied the Ravens logo as vice versa." Infra, note 10. The jury decided this issue of fact after considering such evidence as: the testimony from 19 identification witnesses for the plaintiff that they had seen the plaintiff's shield drawing in late 1995 (two of whom had received copies of the shield drawing as Christmas presents in December, 1995); the March 28, 1996 offer from Mr. Moag to forward Bouchat's drawings to Mr. Modell; the forwarding by Mr. Modell to NFL Properties of unsolicited sketches on at least two occasions in the relevant time period; Bouchat's April 1 or 2, 1996 fax of his shield drawing to Moag; the defendants' inability to present convincing evidence of any preliminary sketches or drawings before April 2, 1996 by NFL Properties of the Ravens shield logo; the June 6, 1996 unveiling of the Ravens shield logo; and the instant recognition by Bouchat and others of the Ravens logo as a copy of Bouchat's work.

The dissent states that there is evidence counter to the above, but such a conflict in evidence presents the classic jury issue, and the jury's resolution of that issue was for the plaintiff.

III.

The second question certified on interlocutory appeal is conditional, requesting a response if the answer to the first certified question was that the plaintiff's evidence of access was insufficient. This court remains firm in its holding that the plaintiff's evidence of access is legally sufficient to sustain the jury's verdict. However, this court also finds it proper to briefly address the question of whether this circuit will adopt the "strikingly similar" doctrine inferring access, as expressed in *Gaste v. Kaiserman*, 863 F.2d 1061, 1068 (2d Cir. 1988).

The strikingly similar doctrine, as expressed in *Gaste*, permits an inference of access in cases where the two works in question are so similar as to create a high probability of copying and negate the reasonable possibility of independent creation. *See id.* at 1067-68. The Seventh Circuit has also adopted this doctrine in agreement with *Gaste*, holding that "a similarity that is so close as to be highly unlikely to have been an accident of independent creation is evidence of access." *Ty, Inc. v. GMA Accessories, Inc.*, 132 F.3d 1167, 1170 (7th Cir. 1997). The Fifth Circuit, on the other hand, has held that where there is striking similarity that precludes the possibility of independent creation, " 'copying' may be proved without a showing of access." *Ferguson v. National Broadcasting Co., Inc.*, 584 F.2d 111, 113 (5th Cir. 1978) (citations omitted). Unlike the Fifth Circuit, this court does not favor the wholesale abandonment of the access requirement in the face of a striking similarity. Rather, like the Second and Seventh Circuits, this court recognizes that striking similarity is one way to demonstrate access. Access remains an indispensable part of a copyright infringement claim.

As made clear by the Second Circuit in *Gaste*, "Though striking similarity alone can raise an inference of copying, that inference must be reasonable in light of all the evidence." 863 F.2d at 1068; *see also Selle v. Gibb*, 741 F.2d 896, 901

(7th Cir. 1984) ("no matter how great the similarity between the two works, it is not their similarity *per se* which establishes access"). Furthermore, the Second Circuit went on to explain that "[a] plaintiff has not proved striking similarity sufficient to sustain a finding of copying if the evidence as a whole does not preclude any reasonable possibility of independent creation." *Id.* (citations omitted). It is clear that a showing of striking similarity does not per se relieve the plaintiff of his burden of establishing access. However, striking similarity is circumstantial evidence of copying, thereby supporting an inference of access. What is important is that the access prong remains intact, but the level of similarity between the contested works can be used as evidence of access. Any finding of access must be reasonable in light of all of the facts of a particular case. This interpretation is consistent with that of the Second and Seventh Circuits. There is no binding precedent in the Fourth Circuit that addresses the substance of the *Gaste* opinion.[2]

As discussed in Section II of this opinion, the plaintiff in this matter made a reasonable showing of access, independent from the striking similarity of the works. However, the striking similarity of the works was a proper factor for the jury to consider, in conjunction with all other evidence, to determine whether the plaintiff had proven copying by circumstantial evidence.

IV.

Defendants contend that Bouchat's drawing does not qualify for copyright protection, because it does not contain sufficiently original elements. However, the copyright infringement claim should not be dismissed based on alleged

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[2] Prior to the instant opinion, this court has only cited *Gaste* in one published opinion. In *Towler v. Sayles*, this court mentions *Gaste* but expressly declined to answer the question as to the requisite proof of access in the face of striking similarity. See 76 F.3d 579, 584-85 (4th Cir. 1996).

defects in plaintiff's copyright application. Defendants' argument on this point must be rejected.

Bouchat's drawing contains several public domain elements which are not protectable. These elements, however, were selected, coordinated, and arranged in such a way as to render the work original. *See Feist Publications, Inc. v. Rural Telephone Service Co.*, 499 U.S. 340, 345-46, 358, 113 L. Ed. 2d 358, 111 S. Ct. 1282 (1991); *M. Kramer Manufacturing Co., Inc. v. Andrews*, 783 F.2d 421, 438-39 (4th Cir. 1986). The drawing, therefore, is entitled to copyright protection.

The district court recognized that Bouchat failed to note the derivative nature of his authorship in his copyright application, but the court also found that there is no evidence of any fraudulent or knowing misstatement with regard to the application. (JA at 1310.) This court held, in *Service & Training, Inc. v. Data General Corp.*, 963 F.2d 680, 689 (4th Cir. 1992), that an inadvertent omission will not invalidate a copyright registration.

Defendants argued below that the alleged flaw in Bouchat's copyright application served to divest the district court of subject matter jurisdiction over the infringement claim. (JA at 1310.) On appeal, they now argue that the flaw in the application serves to divest Bouchat of all copyright protection and thus is fatal to his infringement claim as a threshold matter. However, the premise on which this argument is built—that Bouchat's drawing is not protectable —is simply wrong. Neither the fact that Bouchat incorporated public domain elements in his drawing (the letter "B", a cross, a shield) nor the fact that he did not expressly indicate on his application that such elements rendered his authorship of the drawing derivative in nature, invalidate the protection to which his drawing is otherwise entitled under his valid copyright registration. *See Service & Training*, 963 F.2d at 689. Accidental but harmless mistakes in a copyright

application do not subsequently preclude an infringement action against an alleged copier.

V.

Although the jury had difficulty in reaching a verdict, and the district court judge gave supplemental instructions twice, including an Allen charge, the court did not improperly coerce the jury to reach its verdict. Supplemental instruction may not be coercive, and a reviewing court must consider the totality of the circumstances in deciding whether the trial court abused its discretion. *Bristol Steel & Iron Works, Inc. v. Bethlehem Steel Corp.*, 41 F.3d 182, 191 (4th Cir. 1994).

The district court delivered the Allen charge on Friday, October 30, 1998 at 2:10 PM. The jury continued to deliberate until 5 PM that day, and again on Tuesday, November 3. On Tuesday, the jury sent a note to the judge, in response to which the court delivered further supplemental instructions. When the court inquired as to the scheduling preferences of the jurors later that afternoon, they responded at 4:30 PM, indicating that they were making progress. At 5:10 PM the jury reached its verdict.

The district court specifically told the jurors that it was not suggesting anyone surrender their honest convictions about the case. (JA 1200-1201.) The district court characterized its instructions as "fair and balanced," (JA 1327), and such a characterization is accurate. The fact that the jurors were actively encouraged to persist in their effort to reach consensus does not mean that they were coerced.

VI.

Based on the foregoing, this court affirms the district court's denial of the defendants' motion for judgment as a matter of law, and responds to the question posed in the interlocutory appeal.

AFFIRMED

KING, Circuit Judge, dissenting:

Because the jury's verdict in favor of Bouchat is entirely without legal or factual support, the district court erred in denying the defendants' renewed motion for judgment as a matter of law. The defendants are entitled to judgment, and therefore I must respectfully dissent.

I.

We review de novo the district court's denial of the defendants' Rule 50(b) motion for judgment as a matter of law, viewing the evidence in the light most favorable to Bouchat, and giving him the benefit of all reasonable inferences. *See Austin v. Paramount Parks, Inc.*, 195 F.3d 715, 727 (4th Cir. 1999). If there is evidence upon which a reasonable jury could have found in Bouchat's favor, we are obliged to affirm the jury's verdict. *Duke v. Uniroyal, Inc.*, 928 F.2d 1413, 1417 (4th Cir. 1991).

Although appellate courts are "compelled to accord the utmost respect to jury verdicts and tread gingerly in reviewing them, we are not a rubber stamp convened merely to endorse the conclusions of the jury, but rather have a duty to reverse the jury verdicts if the evidence cannot support it[.]" *Price v. City of Charlotte*, 93 F.3d 1241, 1250 (4th Cir. 1996) (internal citations omitted). Judgment as a matter of law is appropriate when "there is no legally sufficient evidentiary basis" to support the jury's verdict. Fed. R. Civ. P. 50(a)(1).

II.

To prove copyright infringement, a plaintiff must present evidence establishing two elements by a preponderance of the evidence: "(1) ownership of a valid copyright, and (2) copying of constituent elements of the work that are original." *Feist Publications, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 361, 113 L. Ed. 2d 358, 111 S. Ct. 1282 (1991). I agree with the majority that Bouchat has satisfied the first element of a

copyright infringement action. Ante at 2000 U.S. App. LEXIS 34656, *6. That is, Bouchat does possess a valid certificate of copyright registration for his shield drawing from the United States Copyright Office—dated almost two months after the Ravens publicly unveiled their shield logo.[1] *See* J.A. 27.

With regard to the second element, however, I simply cannot agree with the majority's conclusion that this evidentiary record establishes that the defendants copied Bouchat's shield drawing. Proof of copying may be accomplished by either direct evidence or circumstantial evidence. *Keeler Brass Co. v. Continental Brass Co.*, 862 F.2d 1063, 1064 (4th Cir. 1988). In cases where direct evidence is lacking, a plaintiff may prove copying by presenting circumstantial evidence that: (i) the alleged infringer had access to the plaintiff's work; and (ii) the infringer's work is "substantially similar" to the plaintiff's original. *Towler v. Sayles*, 76 F.3d 579, 581-82 (4th Cir. 1996).

In this case, Bouchat presented no direct evidence that the defendants copied his drawing in creating the Ravens shield logo. Thus, Bouchat bore the burden of demonstrating through circumstantial evidence that the defendants had access to his work, and that the Ravens shield logo is "substantially similar" to his original work. As the district court recognized, substantial similarities in the two works are readily apparent. Therefore, the outcome of this proceeding hinges on a single inquiry: whether Bouchat demonstrated that the defendants had "access" to his shield drawing.

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[1] Bouchat's copyright registration is dated July 25, 1996. The Ravens publicly unveiled their new uniforms and insignia, including the shield logo, on June 6, 1996.

III.

To prove access, Bouchat was required to show that the defendants—specifically the NFLP designers charged with creating the logo for Baltimore's new professional football franchise—had a reasonable opportunity to view, and thereby copy, his shield drawing. *See* ante at 2000 U.S. App. LEXIS 34656, *7 (citation omitted). A "mere possibility" is not enough; rather it "must be reasonably possible that the paths of the infringer and the infringed work crossed." *Towler*, 76 F.3d at 582 (emphasis added) (citing *Moore v. Columbia Pictures Indus., Inc.*, 972 F.2d 939, 942 (8th Cir. 1992)). Indeed, as the majority recognizes, speculative reasoning that "amounts to nothing more than a 'tortuous chain of hypothetical transmittals' is insufficient to infer access." Ante at 2000 U.S. App. LEXIS 34656, *7 (citing *Towler*, 76 F.3d at 583) (quoting *Meta-Film Assocs. v. MCA, Inc.*, 586 F. Supp. 1346, 1355 (C.D. Cal. 1984)).

Notwithstanding the majority's casting aside of the substance of *Towler*, that decision's characterization of "speculative reasoning" is quite apposite here, because Bouchat's evidence of access constitutes nothing more than a "tortuous chain of hypothetical transmittals." To conclude that Bouchat demonstrated "access," the jury necessarily found that Bouchat's shield drawing travelled the following circuitous route:

> —the Maryland Stadium Authority ("MSA") actually received Bouchat's facsimile transmission (Step 1);
>
> —MSA then forwarded Bouchat's fax to the Pratt Street office of John Moag's law firm (Step 2);
>
> —David Modell of the Baltimore Ravens (which rented office space in the Pratt Street building housing Moag's law firm—but on a different floor than Moag), received Bouchat's drawing (Step 3);

—Modell, or someone else within the Ravens organization, forwarded Bouchat's drawing to designers Rhonda Kim and Kurt Osaki of the NFLP in New York (Step 4).

Based on the evidence presented at trial, including Bouchat's testimony that he faxed the drawing to MSA and evidence that MSA regularly forwarded certain correspondence to Moag's law office, the majority finds that Bouchat has met his initial burden in showing that Steps 1 and 2 may have been reached, and that "the jury was thus entitled to conclude that the faxed drawing reached Moag at the Pratt Street office." Ante at 2000 U.S. App. LEXIS 34656, *8.

A.

Given our limited standard of review, I am constrained to agree with the majority that the jury was entitled to credit Bouchat's testimony that he faxed his shield drawing to MSA's office. However, the evidence supporting such a finding, consisting solely of Bouchat's own testimony, is marginal at best.[2] Bouchat presented no witnesses who saw him send the fax; he submitted no confirmation sheet verifying that the facsimile transmission was successful; and he failed to produce any telephone records confirming the transmission. Moreover, the Deputy Director of MSA testified that, following the initiation of this lawsuit, he conducted an investigation to determine whether MSA had received Bouchat's fax. Based on this investigation, he concluded that "every member of MSA staff said they had no knowledge of this drawing." J.A. 322.

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[2] Even the jury was not fully convinced by Bouchat, as evidenced by their simultaneous and inconsistent verdict that he failed to prove that he had faxed two other drawings along with the shield drawing. J.A. 1237, 1239-40.

Nevertheless, I agree with the majority that a reasonable jury could have concluded that Step 1 was adequately proved, and that Bouchat faxed the shield drawing to MSA. However, this is merely the beginning, rather than the end, of our inquiry; Bouchat was required to prove much more.

B.

With regard to Step 2, I cannot agree that the jury, on this evidence, could find the fax reached Moag at the Pratt Street office of his law firm, Patton Boggs. In support of its conclusion otherwise, the majority relies solely on evidence "that the regular practice at MSA was to forward faxes for Moag to his Pratt Street office." Ante at 2000 U.S. App. LEXIS 34656, *8. From this evidence, the jury apparently inferred that Moag had received Bouchat's shield drawing prior to creation of the Ravens shield logo. However, "an inference must be a logical and reasonable deduction from the facts proved. It may be unreasonable if it is at war with uncontradicted or unimpeached facts." *Selle v. Gibb*, 567 F. Supp. 1173, 1182 (N.D. Ill. 1983), *aff'd*, 741 F.2d 896 (7th Cir. 1984) (internal quotations and citation omitted).[3] Thus,

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[3] An "inference" is a common evidentiary device which allows the trier of fact to draw "a logical deduction or conclusion from established fact." *United States v. Grow*, 394 F.2d 182, 199 (4th Cir. 1968). That is, an inference permits the jury to find an ultimate fact to have been proven based upon proof of another fact. The determination of whether an inference is reasonable "cannot be decided in a vacuum; it must be considered in light of the competing inferences to the contrary." *Sylvia Dev. Corp. v. Calvert County, Md.*, 48 F.3d 810, 818 (4th Cir. 1995) (internal citations omitted).

In *Pennsylvania R.R. Co. v. Chamberlain*, 288 U.S. 333, 77 L. Ed. 819, 53 S. Ct. 391 (1931), the Supreme Court concluded that it is "not permissible [to infer the existence of a particular fact] in the face of the positive and otherwise uncontradicted testimony of unimpeached witnesses consistent with the facts actually proved, from which testimony it affirmatively appears that the facts sought to be inferred did not exist." *Id.* at 341. Similarly, in *Ford Motor Co. v. McDavid*, 259 F.2d 261 (4th

if a plaintiff's claim is based upon inferences, they must be logical and reasonable, and not directly contradicted by otherwise undisputed facts. Only then are the inferences permissible.

In this case, the evidence does not permit the inference that Moag received Bouchat's shield drawing. First, beyond the preliminary inference that the fax was received by MSA, Bouchat offered no direct evidence that MSA thereafter forwarded the shield drawing to Moag. Nevertheless, the majority approves of the additional inference—based exclusively on MSA's general policy of forwarding correspondence to Moag—that MSA sent the shield drawing to Moag's law office. I disagree on this point; the majority's inference-uponinference determination that Moag received Bouchat's shield drawing is much too speculative to support a finding of access. *See* Selle, 741 F.2d at 902.

Indeed, the only evidence produced at trial on this issue is inconsistent with the jury's inference that the faxed drawing reached Moag. The office manager at Patton Boggs testified that an investigation of internal office files did not indicate receipt of any drawings from Bouchat. Likewise, when Moag was asked whether he recalled receiving any artistic submissions from Bouchat after their initial meeting, he replied, "No, I do not. I remember meeting Mr. Bouchat but I don't remember receiving anything from him." J.A. 966.

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Cir. 1958), we explored the jury's ability to draw inferences from established facts, writing:

> It is the province of the jury to resolve conflicting inferences from circumstantial evidence. Permissible inferences must still be within the range of reasonable probability, however, and it is the duty of the court to withdraw the case from the jury when the necessary inference is so tenuous that it rests merely upon speculation and conjecture.

*Id.* at 266.

Although it is within the province of the jury to evaluate the credibility of these witnesses, the jury cannot:

> arbitrarily discredit a witness and disregard his testimony in the absence of any equivocation, confusion, or aberration in it. It is not proper to submit uncontradicted testimony to a jury for the sole purpose of giving the jury the opportunity to nullify it by discrediting the witness, when nothing more than mere interest in the case exists upon which to discredit such witness.

M.H. *Thomas & Co. v. Hawthorne*, 245 S.W. 966, 972 (Tex. Civ. App. 1922) (quoted with approval in *Chesapeake & O. Ry. Co. v. Martin*, 283 U.S. 209, 219-20, 75 L. Ed. 983, 51 S. Ct. 453 (1931)). *See also Browning v. Crouse*, 356 F.2d 178, 180 (10th Cir. 1966); *Eaton v. National Broadcasting Co.*, 972 F. Supp. 1019, 1024 (Ed. Va. 1997), aff'd, 1998 U.S. App. LEXIS 10288, No. 97-2162, 1998 WL 258381 (4th Cir. May 21, 1998) (per curiam). As the Seventh Circuit recognized in Selle, "the testimony of credible witnesses concerning a matter within their knowledge cannot be rejected without some impeachment, contradiction or inconsistency with other evidence on the particular point at issue." 741 F.2d at 903 (citations omitted).

In the face of the uncontradicted evidence that Bouchat's shield drawing was not received at Moag's law office, MSA's general practice of forwarding correspondence to Moag, standing alone, is simply insufficient to support a jury finding that the drawing actually reached Moag's office. In short, the majority's second inference (Step 2)-that MSA forwarded the drawing to Moag's—amounts to nothing more than "mere speculation, conjecture, or a bare possibility of access." *See Selle*, 741 F.2d at 902.

C.

Furthermore, assuming the jury could permissibly find that the shield drawing reached Moag's office (Step 2), Bouchat's proof of access is even less convincing in the succeeding two steps. After the drawing reached Moag's law office, Step 3 in the access analysis is premised on another inference—that the fax was then sent to Modell of the Ravens organization. In this regard, the majority infers access based on another thin reed—the mere fact that the Ravens rented temporary office space from Moag's law firm: "By proving that the drawings were transmitted to Moag, and that Modell shared the same office space with Moag, Bouchat proved that Modell had 'access' to Bouchat's drawing." Ante at 2000 U.S. App. LEXIS 34656, *9.

Once again, however, Bouchat produced no evidence to corroborate his contention that Modell received the shield drawing. Instead, Bouchat asks us to infer—based on his testimony that he sent a fax of the drawing to MSA—that MSA received it; infer further-based on MSA's policy of forwarding correspondence addressed to Moag to Moag's law office—that the drawing was sent to Patton Boggs; and then infer even—based on the fact that the Ravens rented office space from Patton Boggs—that Modell received the drawing. While the majority regards an office policy as sufficient proof that MSA forwarded the fax to Moag, it ignores Moag's personal policy and practice to the contrary of not forwarding to the Ravens material sent to MSA. This error directly conflicts with both common sense and numerous authorities to the contrary. Corporate receipt of the material alleged to be infringed is simply insufficient proof of access in the face of uncontroverted evidence that corporate policy was to separate these sorts of submissions from the alleged infringers. *See Grubb v. National Football League Properties*, 901 F. Supp. 36, 39 (D. Mass. 1995); *Vantage Point, Inc. v. Parker Bros., Inc.*, 529 F. Supp. 1204 (E.D.N.Y. 1981). Furthermore, the

evidence at trial is consistent with Moag's policy of not forwarding material to the Ravens. The undisputed evidence was that neither Modell nor any other Ravens official ever received Bouchat's shield drawing. As the district court conceded, "There is no direct evidence specifically proving that the Shield Drawing fax was provided to Mr. Modell, and he generally denies any knowledge of such a fax." J.A. 1313.

There is more. All witnesses from the Ravens organization categorically denied having received or viewed Bouchat's shield drawing prior to creation of the Ravens shield logo. Modell himself testified unequivocally that he never received any Bouchat drawings. Likewise, David Cope, the Ravens vice-president for marketing (and the official responsible for handling outside submissions during the months of March and April 1996), testified that he did not see any drawings submitted by Bouchat. Although juries are generally entitled to disbelieve the testimony of any witness, "the testimony of credible witnesses concerning a matter within their knowledge cannot be rejected without some impeachment, contradiction or inconsistency with other evidence on the particular point at issue." *Selle*, 741 F.2d at 903 (citations omitted). Again, the inference that Modell received the shield drawing cannot fairly be characterized as anything other than "mere speculation, conjecture, or a bare possibility of access."

D.

Nonetheless, even if we also assume that Modell received Bouchat's shield drawing (Step 3), such a conclusion still leaves the drawing nearly 200 miles south of the NFLP's New York office. To establish access, Bouchat bore the additional burden of proving Step 4—that Kim and Osaki, the NFLP's creators of the allegedly infringing work, had a reasonable opportunity to view or to copy his shield drawing. *See Towler*, 76 F.3d at 582; *see also Eaton*, 972 F. Supp. at 1024 n.7 (E.D. Va. 1997) ("Proof of access is only probative

of copying to the extent that the alleged copier had access to the protected work. Thus, it is access by the creators of the allegedly infringing work that must be shown.").

1.

Significantly, the majority does not discuss whether Kim and Osaki had a reasonable opportunity to view or copy Bouchat's shield drawing. The majority's analysis on this point is a single sentence, concluding simply, "The jury was entitled to infer that the NFL designers had access if a third party intermediary (Modell) with a close relationship to the alleged infringers (the NFL designers) had access." Ante at 2000 U.S. App. LEXIS 34656, *7. Under this so-called "third party intermediary doctrine," courts may "infer that the alleged infringer had a reasonable possibility of access if the author sent the copyrighted work to a third party intermediary who has a close relationship with the infringer." *Towler*, 76 F.3d at 583.

The problem with this point is simple—the inference is rebutted by uncontradicted testimony. Inferring access under this doctrine, like any inference, must be a reasonable deduction from established fact. *See Grow*, 394 F.2d at 199. The defendants introduced undisputed evidence inconsistent with the majority's inference that Modell shared the drawings with someone at the NFLP. For instance, Mr. Cope testified that the Ravens did not forward any materials or drawings to the NFLP after March 18, 1996, approximately two weeks prior to Bouchat's claimed date of access.[4] Similarly, the

[4] In finding the evidence sufficient to support the jury's finding of access, the district court relied largely on evidence "that at least on two occasions in the pertinent time period, unsolicited sketches were sent by Mr. David Modell to NFLP." J.A. 1314. However, both of these submissions were forwarded to the NFLP prior to the Ravens's institution of a no-forwarding policy on March 18, 1996. By contrast, as Cope's undisputed testimony indicated, the policy was in effect when Bouchat

undisputed evidence indicates that Bouchat's shield drawing was not received by the NFLP in New York. Bruce Burke, the NFLP's vice president and creative director, when asked whether he saw any of Bouchat's drawings prior to the final selection of the Ravens logos, testified simply, "No, absolutely not." J.A. 864. Similarly, Paula Guibault, the NFLP's senior intellectual property counsel, when asked whether she had seen any of Bouchat's drawings prior to the initiation of this lawsuit, replied, "No, I did not." J.A. 1053. And finally, both Kim and Osaki, the NFLP artists responsible for the design of the Ravens shield logo, testified unequivocally that they had never seen any drawings submitted by Bouchat.[5]

Given the complete absence of evidence that Bouchat's shield drawing was received in the NFLP's New York office, the inference that the NFLP designers had access to the drawing is the result of an illogical and impermissible series of inferences. Although the old rule that disallowed the piling of inference upon inference has been abrogated, such pilings must be "well supported by the evidence. We must . . . take into consideration that its probability may be attenuated by each underlying inference." *Cora Pub, Inc. v. Continental Cas. Co.*, 619 F.2d 482, 486 (5th Cir. 1980). In this case, the endless piling of unsupported and contradicted inference upon inference upon inference rises to the level of absurdity.

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allegedly faxed his shield drawing on April 1, 1996. Therefore, the district court's suggestion that unsolicited sketches were forwarded to the NFLP during "the pertinent time period" is inaccurate.

[5] Kim and Osaki were initially contradicted by Bouchat's "expert," who testified that it was a "fact[ ]" that Asians—Kim and Osaki are presumably of Asian descent—are "taught in their culture" to copy. J.A. at 160. Three weeks after that improper testimony, the court instructed the jury to disregard it.

2.

In the copyright context, a special requirement of access has been established to prevent exactly the sort of problem this case presents. Other federal courts, perhaps after seeing a dizzying array of meritless copyright claims, have offered insight into the problem. In *Meta-Film Assocs. v. MCA*, Inc., 586 F. Supp. 1346 (C.D. Cal. 1984), for example, the court rejected a claim of infringement over an unsolicited script sent to a movie studio that eventually produced the movie "Animal House." In doing so it observed that "in such a business [film production], countless unsolicited scripts are submitted to numbers of individuals on studio lots every day. Under these circumstances, it is clearly unreasonable to attribute the knowledge of any one individual . . . to every other individual just because they occupy offices on the same studio lot."

The New York federal courts have frequently dealt with instances of a plaintiff coming forward with a "bare corporate receipt," alleging that he or she sent unsolicited material to various well-known companies. The plaintiff later sues when a similar work is produced. These decisions have been steadfast in holding that access cannot be permissibly inferred from such "bare corporate receipt." *See Dimmie v. Carey*, 88 F. Supp. 2d 142, 146-49 (S.D.N.Y. 2000) (rejecting claim of infringement on Mariah Carey song where plaintiff alleged sending tape to Columbia Records, then theorized Carey's eventual access by a "series of uncertain inferences" not unlike those offered by Bouchat); *Tisi v. Patrick*, 97 F. Supp. 2d 539, 547-48 (S.D.N.Y. 2000) (rejection of "bare corporate receipt" as proof of access under similar facts); *Cox v. Abrams*, 1997 U.S. Dist. LEXIS 6687, 1997 WL 251532 (S.D.N.Y. May 14, 1997) (unpublished); *Novak v. National Broad. Co.*, 752 F. Supp. 164 (S.D.N.Y. 1990).

Indeed, this is not the first time the NFL has been alleged —on unsupported facts—to have infringed other artistic work

in creating a design. *See Grubb v. National Football League Properties, Inc.*, 901 F. Supp. 36, 39 (D. Mass. 1995) (refusing to "discredit the testimony" of numerous defense witnesses, responsible for the production of a new logo for the New England Patriots, that they had never seen the plaintiff's proposed logo, when the plaintiff had "not shown any evidence" of access).

The facts here resound of those above. These cases typically involve similar litigation over successful movies, books, songs or other artistic works. Inevitably, a plaintiff comes forward claiming to have thought of the idea first—only to have no evidence, except for having sent his or her work to a corporation or person affiliated with the alleged infringer.[6] While some also have proof that somebody read their work, many do not.[7] But where the proof is extraordinarily thin and based on a chain of unsupported and fanciful inferences, the courts have rightfully found the access requirement unmet. In stark contrast to this insight, the majority dismantles the access requirement by allowing a tenuous, unproved, contradicted, and inconsistent chain of inferences to satisfy *Towler* and prove access. This guts the entire purpose of the access requirement, and it will inevitably lead to further jury verdicts ad absurdum.

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[6] Indeed, *Dimmie*, *supra*, involved the second plaintiff to bring a claim of infringement against Mariah Carey over the song "Hero." An earlier case, described by the court as a "complete fabrication," was also dismissed. *See Selletti v. Carey*, 177 F.R.D. 189, 193 (S.D.N.Y. 1998).

[7] At least two recent cases have indicated that the lack of "concrete evidence" of actual receipt "such as a postage receipt or an entry in . . . submission logs" can be dispositive of a claim of access based merely on corporate receipt. *See Tomasini v. Walt Disney Company*, 84 F. Supp. 2d 516, 520 (S.D.N.Y. 2000); *Dimmie*, 88 F. Supp. 2d at 146 (S.D.N.Y. 2000).

## IV.

After incorrectly concluding that Bouchat had met his burden of showing access under *Towler*, the majority unnecessarily adopts a new legal principle—the "strikingly similar" doctrine.[8] The majority concludes that, even if the plaintiff had not met the burden of showing access, the "striking similarity [between the plaintiff's original work and the alleged infringing work] is one way to demonstrate access." Ante at 2000 U.S. App. LEXIS 34656, *13. That is, based on the striking similarity between Bouchat's shield drawing and the Ravens shield logo, Bouchat is entitled to an inference that the defendants had a reasonable opportunity to view and thereby copy his work.

### A.

This is an interlocutory appeal under the provisions of 28 U.S.C. § 1292(b). The issues presented are: (1) Was the plaintiff's proof of a reasonable possibility of access legally insufficient? (2) If so, will the Fourth Circuit adopt the 'strikingly similar' doctrine inferring access as expressed in *Gaste v. Kaiserman*, 863 F.2d 1061, 1068 (2d Cir. 1988)?" J.A. 1328-29 (emphasis added). After holding that the plaintiff's proof of access was not insufficient, the majority had no reason to answer the second question. It does so nevertheless and, in my view, does so incorrectly.[9]

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[8] The majority concedes that we have never adopted the "strikingly similar" doctrine. In the only case in which we have addressed this issue on the merits, albeit in an unpublished decision, we expressly rejected the adoption of the doctrine. *See Takeall v. Pepsico, Inc.*, 1993 U.S. App. LEXIS 31911, No. 93-1237, 1993 WL 509876 (4th Cir. Dec. 8, 1993). In *Takeall*, the plaintiff urged us to adopt a "*per se* rule regarding the elimination of the need for proof of access in cases involving 'striking similarity.' " *Id.* at

[9] The majority's adoption of the "strikingly similar" doctrine is unnecessary dicta, and should accordingly lack precedential value.

Relying on *Gaste* and the Seventh Circuit's decision in *Selle v. Gibb*, the majority adopts the "strikingly similar" doctrine, which holds that "striking similarity is circumstantial evidence of copying, thereby supporting an inference of access." *Id.* In *Gaste*, the Second Circuit described the contours of the doctrine as follows:

> Though striking similarity alone can raise an inference of copying, that inference must be reasonable in light of all the evidence. A plaintiff has not proved striking similarity sufficient to sustain a finding of copying if the evidence as a whole does not preclude any reasonable possibility of independent creation.

*Gaste*, 863 F.2d at 1068 (emphasis added).

Similarly, the Seventh Circuit in *Selle* recognized that striking similarity does not completely eliminate the need for additional proof of access:

> Striking similarity is just one piece of circumstantial evidence tending to show access and must not be considered in isolation; it must be considered together with other types of circumstantial evidence relating to access. As a threshold matter, therefore, it would appear that there must be at least some other evidence which would establish a reasonable possibility that the complaining work was available to the alleged infringer. . . . The plaintiff must always present sufficient evidence to support a reasonable possibility of access because the jury cannot draw an inference of access based upon speculation and conjecture alone.

741 F.2d at 901. Based on *Gaste* and *Selle*, the majority maintains that Bouchat is entitled to an inference of access because of the striking similarity between the Ravens shield logo and his shield drawing.

B.

I am unable to join in the majority's endorsement of the "strikingly similar" doctrine. The doctrine's underlying assumption is that where two works are so strikingly similar, there is a high probability that one was copied from the other. *See Gaste*, 863 F.3d at 1067-68. However, this assumption, standing alone, runs contrary to a fundamental principle of copyright protection: independent creation. *See Feist*, 499 U.S. at 345 (recognizing that "originality," the sine qua non of copyright protection, requires independent creation and some degree of creativity). Evidence of copying—access plus substantial similarity—is "crucial to any claim of copyright infringement because no matter how similar the two works may be (even to the point of identity), if the defendant did not copy the accused work, there is no infringement." 741 F.2d at 901 (citation omitted). Indeed, "two works may be identical in every detail, but, if the alleged infringer created the accused work independently or both works were copied from a common source in the public domain, then there is no infringement." *Id.* As Judge Learned Hand observed in *Sheldon v. Metro-Goldwyn Pictures Corp.*, 81 F.2d 49 (2d Cir. 1936), *aff'd*, 309 U.S. 390, 392, 84 L. Ed. 825, 60 S. Ct. 681 (1940), "If by some magic a man who had never known it were to compose anew Keats's Ode on a Grecian Urn, he would be an 'author,' and, if he copyrighted it, others might not copy that poem, though they might of course copy Keats's." *Id.* at 54.

However, under the majority's "strikingly similar" doctrine, one who plagiarized Keats's Ode on a Grecian Urn in 1820 would arguably be entitled to an inference of infringement—based merely on the similarity of the two works—against one of England's greatest poets. Such an absurd result illustrates why the requirement of proving substantial similarity should remain independent of the requirement of demonstrating access—Keats's poem is

"strikingly similar" to the hypothetical plaintiff's poem because the plaintiff copied it from him.[10] Simply put, in examining a plaintiff's circumstantial evidence of copying, proof of one element should not allow a court to infer the existance of the other.

V.

For the foregoing reasons, I have concluded that the jury's verdict in favor of Bouchat is unsupported both factually and legally, and I respectfully dissent

[10] The panel majority has affixed to its opinion Bouchat's shield drawing and the Ravens logo, apparently to illustrate their "striking similarity" to each other. It strikes me that these drawings better illustrate the point made in the Keats' hypothetical. In fact, it is just as likely that Bouchat copied the Ravens' logo as vice versa. It bears repeating, *see supra* note 1, that Bouchat did not copyright his shield drawing until nearly two months after the Ravens unveiled their logo.

## APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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No. 99-1617

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FREDERICK E. BOUCHAT,
*Plaintiff-Appellee*,

v.

BALTIMORERAVENS, INCORPORATED; NATIONAL FOOTBALL LEAGUE PROPERTIES, INCORPORATED,
*Defendants-Appellants*.

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December 28, 2000, Filed

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NOTICE:

DECISION WITHOUT PUBLISHED OPINION

ORDER

H.E. Widener, Jr.,

We have considered the petition for rehearing in this case, filed by Baltimore Ravens, Inc., *et al.*, and the response of Bouchat.

Upon a request for a poll of the court, Judges Wilkinson, Niemeyer, Michael, Motz and King voted to grant rehearing en banc. Judges Widener, Wilkins, Luttig and Traxler voted to deny rehearing en banc.*

Fewer than a majority of the circuit judges who are in regular active service having voted for rehearing en banc, it is

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* Judge Williams being disqualified, did not participate in the decision in this case.

accordingly ADJUDGED and ORDERED that the petition for rehearing en banc shall be, and it hereby is, denied.

The panel considered the petition for rehearing and is of opinion it is without merit.

It is accordingly ADJUDGED and ORDERED that the petition for rehearing shall be, and it hereby is, denied.

It is FURTHER ORDERED that the opinion in this case shall be, and it hereby is, amended by adding thereto Footnote AI in the slip opinion, page 11, following the word "drawing," the last word of Part II of the opinion. Footnote AI is attached hereto and made a part hereof.

It is FURTHER ORDERED that the slip opinion shall be, and it hereby is, further amended by the addition of Footnote 10 following the word "him" in the third line from the bottom of page 23 of the slip opinion, which Footnote 10 is attached hereto and made a part hereof.

With the concurrence of Judge J. H. Michael. Judge King dissents. He would grant rehearing and require judgment to be entered for the defendants, for the reasons expressed in his dissenting opinion.

/s/ H. E. Widener, Jr.
H.E. WIDENER, JR.

**Footnote AI**




Plaintiff's Drawing The Accused Work

A copy of the plaintiff's shield logo and the accused work of the NFL Properties is shown above. There is no dispute as to the similarity of the works, not only because the similarity is facially indisputable, but the defendants' expert witness testified, and the plaintiff's expert agreed, that the designs are so similar that they could not have been created independently from one another. The dissent notes that "it is just as likely that Bouchat copied the Ravens logo as vice versa." Infra, note 10. The jury decided this issue of fact after considering such evidence as: the testimony from 19 identification witnesses for the plaintiff that they had seen the plaintiff's shield drawing in late 1995 (two of whom had received copies of the shield drawing as Christmas presents in December, 1995); the March 28, 1996 offer from Mr. Moag to forward Bouchat's drawings to Mr. Modell; the forwarding by Mr. Modell to NFL Properties of unsolicited sketches on at least two occasions in the relevant time period; Bouchat's April 1 or 2, 1996 fax of his shield drawing to Moag; the defendants' inability to present convincing evidence of any preliminary sketches or drawings before April 2, 1996 by NFL Properties of the Ravens shield logo; the June 6, 1996 unveiling of the Ravens shield logo; and the instant recognition by Bouchat and others of the Ravens logo as a copy of Bouchat's work.

The dissent states that there is evidence counter to the above, but such a conflict in evidence presents the classic jury issue, and the jury's resolution of that issue was for the plaintiff.

**Footnote 10**

The panel majority has affixed to its opinion Bouchat's shield drawing and the Ravens logo, apparently to illustrate their "striking similarity" to each other. It strikes me that these drawings better illustrate the point made in the Keats' hypothetical. In fact, it is just as likely that Bouchat copied the Ravens' logo as vice versa. It bears repeating, *see supra* note 1, that Bouchat did not copyright his shield drawing until nearly two months after the Ravens unveiled their logo.

**APPENDIX C**

NOTICE OF ISSUANCE OF MANDATE

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

January 29, 2001

MANDATE

TO: Clerk, District Court/Agency

FROM: Merlene Smith-Taylor Deputy Clerk

RE: 99-1617 *Bouchat v. Baltimore Ravens Inc* CA-97-1470-MJG

HEREWITH IS THE MANDATE OF THIS COURT, ISSUED THIS DATE, ON THE JUDGMENT ENTERED BY THE COURT ON 10/3/00.

[ ] Order and Certified Copy of Judgment
[X] Opinion and Certified Copy of Judgment
[X] Order on Costs
[ ] Other:_____
[ ] The record has been retained for use in case number _____

A copy of the judgment is enclosed to counsel/*pro se* parties.

cc: Howard J. Schulman
George Beall
Marc Edward Ackerman √
Robert Lloyd Raskopf
John Paul Reiner

[Filed January 29, 2001]

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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No. 99-1617
CA-97-1470-MJG

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FREDERICK E. BOUCHAT,
*Plaintiff-Appellee*,

v.

BALTIMORE RAVENS, INCORPORATED;
NATIONAL FOOTBALL LEAGUE PROPERTIES, INCORPORATED,
*Defendants-Appellants*.

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ORDER

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The Appellee has filed a bill of costs.

The Court awards $308.00 in costs.

For the Court—By Direction

/s/ Patricia S. Connor
CLERK

[Filed: October 3, 2000]

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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No. 99-1617
CA-97-1470-MJG

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FREDERICK E. BOUCHAT,
*Plaintiff-Appellee*,

v.

BALTIMORE RAVENS, INCORPORATED;
NATIONAL FOOTBALL LEAGUE PROPERTIES, INCORPORATED,
*Defendants-Appellants*.

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Appeal from the United States
District Court for the
District of Maryland at Baltimore

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JUDGMENT

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In accordance with the written opinion of this Court filed this day, the Court affirms the judgment of the District Court.

/s/ Patricia S. Connor
CLERK

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

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No. MJG-97-1470

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FREDERICK E. BOUCHAT,
*Plaintiff*

v.

BALTIMORE RAVENS, INC., *et al.*,
*Defendants*

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MEMORANDUM & ORDER

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The Court has before it Defendants' Motion for Judgment as a Matter of Law Notwithstanding the Verdict or for a New Trial, and the materials submitted by the parties relating thereto. The Court has held a hearing and had the benefit of the arguments of counsel.

This case presents the question whether the accused work was created through copying of Plaintiff's Drawing.







Plaintiff's Drawing The Accused Work

## I. INTRODUCTION AND SUMMARY

As noted above, this case presents the question whether Defendant National Football League Properties, Inc. ("NFLP") copied Plaintiff Frederick Bouchat's ("Bouchat" or "Plaintiff") Shield Drawing when creating its Ravens' Shield Logo as shown above.[1]

The jury found that Plaintiff had carried his burden of proving that:

1. Prior to January 1, 1996, Bouchat created the Shield Drawing.
2. On April 1 or 2, 1996, Bouchat sent, by fax, a copy of this drawing to the Maryland Stadium Authority.
3. There is a reasonable possibility that a copy of Plaintiff's Shield Drawing was seen by the NFLP creators of the Ravens' Shield Logo.
4. The Ravens' Shield Logo is substantially similar to Plaintiff's Shield Drawing.
5. The Ravens' Shield Logo is so strikingly similar to Plaintiff's Shield Drawing that there is no reasonable possibility of independent creation by NFLP.
6. NFLP did not create the Shield Logo independently from Plaintiff's Shield Drawing.

As discussed more fully herein, the jury verdict was supported by adequate evidence. Moreover, in light of the burden of proof imposed upon the Plaintiff and the parties' contentions, the jury findings were not inconsistent so as to warrant a retrial of the case. Further, the jury verdict was not the result of any improper coercion.

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[1] The similarity is even more striking when a full color rendition of the NFLP work is viewed.

## II. FACTUAL BACKGROUND [2]

Plaintiff is an individual with limited formal education [3] and a longstanding avocation as a drawer of pictures based upon comic book characters. Bouchat was employed as a security guard at the Maryland Department of Labor, Licensing and Regulation ("DLLR") from 1994 until July, 1997. He was stationed in the guard booth at the entrance of DLLR's office building, passed twice (or more) a day by employees and vendors. Bouchat regularly engaged in drawing pictures and displaying them at the guard booth.

In 1995, the Maryland Stadium Authority, led by its Chairman, John Moag, successfully concluded its effort to obtain a National Football League team for Baltimore. On November 6, 1995, there was a public announcement that the Cleveland Browns would be moving to Baltimore within a short time, developing local (Baltimore) interest in a new name for the team. Bouchat became interested in the new football team. He began producing drawings of designs for the team using various names that were generally discussed or, possibly, that occurred only to him. Thus, he drew designs for teams with names such as "Jockeys," "Comets," and, of course, "Ravens."

As found by the jury, and supported by ample evidence [4], on/or about December 5, 1995, Bouchat created and

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[2] The facts stated herein are either undisputed or presented based upon the evidence viewed in the light most favorable to the Plaintiff. *See Zervitz v. Hollywood Pictures*, 995 F. Supp. 596, 598 (D. Md. 1996).

[3] He proceeded in school through the ninth grade.

[4] At trial, Plaintiff presented 19 identification witnesses, who testified that they had seen Plaintiff's Shield Drawing in late 1995. Pursuant to orders issued by the Court, Plaintiff was permitted to depose and call at trial a maximum of 23 witnesses on this issue. *See* Magistrate Judge Paul Grimm's December 17, 1997 Memorandum for Counsel and this Court's September 28, 1998 Order. Two of these witnesses, Anthony Walker and

displayed the Shield Drawing. Bouchat also prepared other Ravens designs at this time. However, he was not able to prove, to the satisfaction of the jury, that either of the two other drawings he placed at issue, the Bird Drawing or the Lightening Drawing [5], had been created in 1995 in the *exact* form that he presented in copyright applications later filed in August of 1996. Also about this time, Bouchat placed a Ravens design on a toy football helmet, (shown in a footnote [6]) that he displayed in the booth. The toy helmet caught the eye of the Secretary of DLLR, Eugene Conti, who, with Bouchat's consent, took the helmet and kept it on display in his office.

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Lena Garrett, testified that they had been given copies of the Shield Drawing as Christmas gifts in December, 1995.

5



Bird Drawing




Lightening Drawing

6

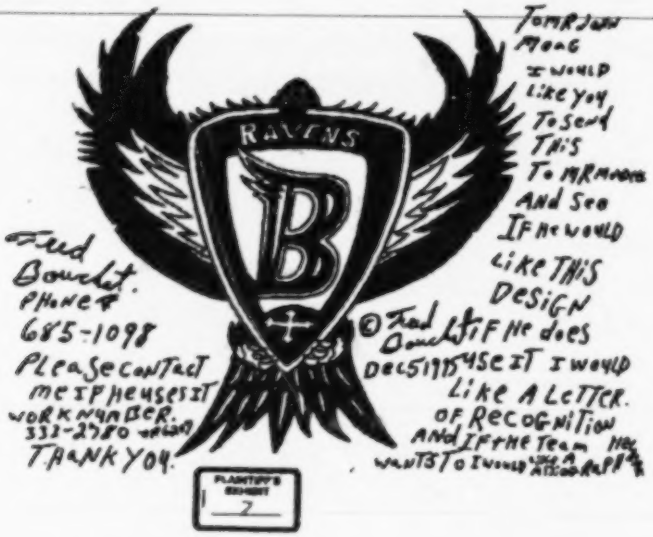


As can be seen, the helmet design is not similar to the Shield Drawing

By March 28, 1996, the day prior to the public announcement of the selection of the Ravens' name, DLLR Secretary Conti had arranged for Bouchat to go the office of Mr. Moag, the Stadium Authority Chair, for a photo session. At the session, photos of Bouchat holding the helmet, and posing with Moag and others, were taken for later publication in an employee newsletter. Although the discussion between Moag and Bouchat was brief, there is evidence which, if accepted by the jury, would establish that Moag told Bouchat to send him his Ravens design drawings, which Moag would forward to the team.[7]

[7] Bouchat so testified. Jan Drabek (Plaintiff's supervisor) testified that Bouchat asked him how to use the DLLR's fax machine because Moag had invited him to send his drawings. Marco Merrick, who attended the photo session, testified that Moag, Bouchat, and Seeman discussed that "perhaps because he didn't have the drawings with him, I could remember maybe some exchange of information as to addresses or telephone numbers where he might be able to meet somebody." Tr. 131-32. Merrick also testified that Bouchat spoke to Moag and Seeman about getting fax numbers and "I just recall that he was sharing that he didn't have all the information, all of the drawings and all of that stuff and I think he wanted to submit it." Tr. at 135.

On April 1 or 2, 1996, Bouchat sent a fax [8] of the Shield Drawing to the Maryland Stadium Authority with a message as shown below:




As discussed herein, the jury found that Plaintiff proved that a copy of Bouchat's Shield Drawing was received by the Baltimore Ravens prior to the time that the NFLP's design team created the Ravens' Shield Logo at issue. The jury further found that there is a reasonable possibility that a copy of Bouchat's Shield Drawing was seen by the people who created the Ravens' Shield Logo prior to the time that the creative people at NFL Properties created the Ravens logos at issue.

In fact, it is not until after April 2 that NFLP produced a shield drawing substantially similar (if not virtually identical)

[8] The jury so found this highly disputed fact.

to Bouchat's Shield Drawing.[9] The jury found that Plaintiff had proven that NFLP, in creating the Ravens' Shield Logo, copied in substantial part from those aspects of the Bouchat Shield Drawing that are protectable by copyright.

On June 6, 1996, the Ravens first publicly displayed their uniform and insignia, including the Shield Logo. Bouchat, and others who had seen Bouchat's Shield Drawing, immediately recognized the Shield Logo as Bouchat's work. Bouchat then contacted counsel and obtained confirmation from various employees and visitors to the building that they had seen his Ravens' drawings prior to the team's public release of its logos.

In August of 1996, Bouchat obtained copyright registration for the Shield Drawing as well as other drawings, including the Bird and Lightening Drawings that were placed at issue in this lawsuit.

On May 1, 1997, Plaintiff filed the instant action against the Ravens and NFLP for infringing his copyrights on the three designs at issue.

On November 3, 1998, the jury returned a verdict finding that the Plaintiff had carried his burden of proof with regard to the Shield Drawing, but not the Bird Drawing or Lightening Drawing.

## III. LEGAL STANDARDS

### A. Judgment as a Matter of Law

Pursuant to Fed.R.Civ.P. 50(b),[10] "[a] [district] court may grant a motion for judgment as a matter of law (formerly

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[9] Defendants' efforts to characterize the earlier NFLP drawings as predecessors in development of the Ravens' Shield Logo were unpersuasive to the jury and are not persuasive to the Court.

[10] A Rule 50(a) motion at the close of all evidence, before the case is submitted to the jury, is a necessary predicate for the filing of a valid Rule

"j.n.o.v.") if, viewing the evidence in the light most favorable to the non-moving party and drawing every legitimate inference in that party's favor, the court determines that the only conclusion a reasonable trier of fact could draw from the evidence is in favor of the moving party." *Tools USA v. Champ Frame Straightening Equip.*, 87 F.3d 654, 656-57 (4th Cir. 1996) (internal quotation and citation omitted).

As expressed by the United States Court of Appeals for the Fourth Circuit in *Whalen v. Roanoke County Bd. of Sup'rs*, 769 F.2d 221 (4th Cir. 1985):

> The question to be resolved in deciding a motion for judgment notwithstanding the verdict is whether there is evidence upon which a jury can properly find a verdict. *Ralston Purina Co. v. Edmunds*, 241 F.2d 164, 167 (4th Cir. 1957). The principles governing decision of the motion have been stated as follows:
>
> > In determining whether the evidence is sufficient the court is not free to weigh the evidence or to pass on the credibility of witnesses or to substitute its judgment of the facts for that of the jury. Instead it must view the evidence most favorably to the party against whom the motion is made and give that party the benefit of all reasonable inferences from the evidence.
>
> 9 Wright & Miller, Federal Practice and Procedure § 2524 at 543-45 (1971).

B. New Trial

There is a different, and in a sense "lower," standard applicable to the motion for a new trial under Rule 59 of the

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50(b) motion. *Price v. City of Charlotte*, 93 F.3d 1241, 1249 (4th Cir. 1996), *cert. denied*, 117 S. Ct. 1246 (1997). Defendants have met their burden in this regard.

Federal Rules of Civil Procedure. When considering a motion for a new trial, the trial judge may take into account his evaluation of the weight of the evidence produced by the respective parties. *Wyatt v. Interstate Ocean and Transport Co.*, 623 F.2d 888 (4th Cir. 1980) . As stated more than 50 years ago by the United States Court of Appeals for the Fourth Circuit:

> [I]t is the duty of the judge to set aside the verdict and grant a new trial, if he is of the opinion that the verdict is against the clear weight of the evidence, or is based upon evidence which is false, or will result in a miscarriage of justice, even though there may be substantial evidence which would prevent the direction of a verdict.

*Aetna Casualty and Surety Co. v. Yeatts*, 122 F.2d 350, 352 (4th Cir. 1941).

## III. DISCUSSION

Defendants present the following grounds for judgment as a matter of law and/or a new trial:

1. This Court lacks subject matter jurisdiction due to invalidity of the copyright registrations.
2. There is no reasonable possibility that Defendants had access to Bouchat's Shield Drawing.
3. NFLP did, in fact, independently create the Ravens' Shield Logo.
4. The Plaintiff cannot rely upon the striking similarity between Bouchat's Shield Drawing and the Ravens' Shield Logo.
5. The Court coerced the jury to reach a verdict.

A. Subject Matter Jurisdiction

Defendants contend that "Bouchat's knowing failure to inform the Copyright Office of the derivative nature of his Shield Drawing invalidates his copyright registration for that drawing and deprives this Court of jurisdiction over Bouchat's copyright infringement claim." Defs. Mem.[11] at 17.

The Court cannot agree with Plaintiff's contention that he "correctly stated that he was claiming a copyright interest in the entire work, *i.e.*, in the selection and arrangement of the various elements contained therein, including the arrangement and selection of the non-copyrightable symbols and shield shape." "P1. Resp.[12] at 6. By failing to note the derivative nature of his authorship, Plaintiff failed to complete accurately his copyright application. However, the Court does agree with Plaintiff that "there is no evidence of any fraudulent or knowing misstatement with regard to [his] copyright application." *Id.* Moreover, there is most definitely no such finding.[13]

The Fourth Circuit, and the overwhelming majority of courts that have addressed the issue have not dismissed a plaintiff's infringement claim based on a lack of subject matter jurisdiction in the absence of proof of fraud or the purposeful failure to advise the copyright office of facts that might have caused rejection of the application. Rather, these courts hold that an inadvertent or innocent omission will not invalidate a copyright registration and thereby divest the court of subject matter jurisdiction. *See, e.g., Service & Training,*

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[11] Defendants' Memorandum in Support of Defendants' Motion for Judgment as a Matter of Law Notwithstanding the Verdict or for a New Trial.

[12] Plaintiff's Memorandum of Law in Support of Response to Defendants' Motion for Judgment as a Matter of Law Notwithstanding the Verdict or for a New Trial.

[13] Defendants, who raised the jurisdiction issue rather late in the proceeding, did not even request a jury question as to Plaintiff's intent with regard to the errors in his copyright applications.

*Inc. v. Data General Corp.*, 963 F.2d 680, 688-89 (4th Cir. 1992); *Russ Berrie & Co., Inc. v. Jerry Elsner Co., Inc.*, 482 F. Supp. 980, 988 (S.D.N.Y. 1980); *Eckes v. Card Prices Update*, 736 F.2d 859, 862 (2d Cir. 1984); *Whimsicality, Inc. v. Rubie's Costume Co.*, 891 F.2d 452 (2d Cir. 1989); *Apple Barrel Productions, Inc. v. Beard*, 730 F.2d 384, 386-87 (5th Cir. 1984); *Original Appalachian Artworks, Inc. v. Toy Loft, Inc.*, 684 F.2d 821, 827-28 (11th Cir. 1982); 2 Nimmer on Copyright § 7.20 [B].

In the instant case, no evidence was presented to establish that Plaintiff omitted information from his application for reasons other than an inadvertent or innocent mistake. Moreover, there is no evidence that the Copyright Office would have denied Plaintiff's application for copyright had Plaintiff disclosed that his drawing included elements that are in the public domain. The undisclosed elements in Plaintiff's Shield Drawing, which are the cross from the Maryland State Flag and a commonly used shield shape, are widely known as being in the public domain.

In sum, Plaintiff's omissions from his application did not divest the Court of subject matter jurisdiction over the instant infringement action.

B. The Finding that Defendants had Access

Defendants argue that the jury's finding that they had access to Plaintiff's drawing is infirm for several reasons: (1) Plaintiff's own testimony proves that no fax was ever sent, Defs. Mem. at 4-6; (2) evidence in the record establishes that no fax was ever forwarded, Defs. Mem. at 6-8; and (3) Plaintiff's claim of access is improperly based on a tortuous chain of hypothetical transmittals, Defs. Mem. at 8.[14]

[14] As discussed below, Defendants also argue that Plaintiff cannot rely upon the strikingly similar doctrine to relieve him of his duty to prove a reasonable possibility of access. Defs. Mem. at 9-11.

Defendants further argue that, in the alternative to judgment as a matter of law, they are entitled to a new trial because the jury's verdict on access is inconsistent. Defs. Mem. at 11-12.

C. Plaintiff's Testimony

The Court concludes that a reasonable jury could have found, and did find, that Plaintiff successfully faxed the Shield Drawing to the Maryland Stadium Authority. Of course, Plaintiff's testimony was subject to different interpretations, some of which could be favorable to the defense. Defendants have assembled various points in their favor but have demonstrated only that the jury *might* reasonably have concluded that the fax was not sent. Hence, Defendants have established no more than the existence of a genuine dispute of fact. Furthermore, there is no evidence, however, that necessarily contradicts Plaintiff's contention that the fax was sent.[15] The jury properly weighed all of the evidence, including evidence corroborating Bouchat's position,[16] and reached the reasonable, if not inevitable, conclusion that the fax was sent.

2. Tortuous Chain of Transmittals

Defendants argue that there is no way, other than through a "tortuous chain," that the Shield Drawing could have gotten

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[15] For example, Defendants emphasize Bouchat's imprecise mode of expression and his confusion as to whether the area code was used when inputting the telephone number into the fax machine. As the jury and Court observed, however, Bouchat does not speak with precision and is an honest person with some intellectual challenges. The area code confusion came about due to the later (after the April, 1996 faxing) switch of the Maryland telephone dialing system to require input of the area code, even for local calls.

[16] For example, Jan Drabek, Bouchat's supervisor, testified that he showed Bouchat how to use the fax machine because Bouchat said that "he had met with the people from the Stadium Authority . . . [and] they expressed an interest in seeing his artwork and he was going to fax his artwork to them." tr. 713.

to NFLP. The Court concludes, however, that the jury could, and did, properly find a reasonable possibility of access based upon the fax to the Maryland Stadium Authority.

One of the Shield Drawing faxes [17] had on it a message addressed to Mr. Moag with a reference to passing the drawing on to Mr. Modell. At the time in question, the Ravens' offices were located in the offices of Moag's law firm. Faxes addressed to Moag and received at the Stadium Authority were regularly sent to his law office. There is no direct evidence specifically proving that the Shield Drawing fax was provided to Mr. Modell, and he generally denies any knowledge of such a fax.[18] Nevertheless, it is not "tortured" logic to find it reasonable that a fax that contained a message referring to its being sent to Mr. Modell [19] would be delivered to Ravens' personnel when received in the office suite shared by Moag's law office and the Ravens.

The Defendants seek to rely on a policy that forbade sending any unsolicited sketches to NFLP to establish that no reasonable jury could conclude that there was a reasonable possibility that Defendants had access to Plaintiff's Shield Drawing. The evidence establishes, however, that at least on two occasions in the pertinent time period, unsolicited sketches were sent by Mr. David Modell to NFLP. Plaintiff's Trial Exhibits 44-45. The policy was, at least, not universally followed.

The Court concludes that there is adequate evidence to support the jury finding of a reasonable possibility of access.

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[17] There were two faxes of the Bird Drawing, one had the message on it and the other did not.

[18] Not surprisingly, in view of the absence of any apparent significance at the time of receipt.

[19] The Ravens' owner.

3. Inconsistency

Defendants maintain that because Plaintiff testified that he faxed the three drawings on the same date (at approximately the same time), the jury's findings that Plaintiff successfully faxed the Shield Drawing to the Maryland Stadium Authority,[20] but that he did not successfully fax the Bird or Lightening Drawings, are inconsistent, thereby requiring a new trial. *City of Los Angeles v. Heller*, 475 U.S. 796, 805 (1986); *Carter v. Rogers*, 805 F.2d 1153, 1159 (4th Cir. 1986).

In *Bristol Steel & Iron Works v. Bethlehem Steel Corp.*, 41 F.3d 182, 190 (4th Cir. 1994), the Fourth Circuit stated that "[t]he answers to special verdicts should be reconciled under any rational theory consistent with the evidence and. . . the answers be harmonized if possible."

The jury findings in this case can be harmonized. One must bear in mind the matter of Plaintiff's burden of proof and the particular questions presented to the jury in this case.

The jury had to answer the following question as to each of the Shield, Bird, and Lightening Drawings at issue:

> Has Plaintiff proven by a preponderance of the evidence that he draw *the precise drawing* shown in [the copyright application] during the year 1995? (emphasis added)

That is, the jury had to determine whether the Plaintiff had drawn, during the year 1995, "the precise drawing shown in" the copyright applications for the Shield, Bird, and Lightening Drawings. There was emphasis during the trial, and in the jury-instructions, regarding the need for Plaintiff to show that these *exact* drawings, without any variation, had been created during 1995.

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[20] I.B.1 of Special Verdict form.

The jury had substantial, and quite persuasive, evidence before it that the Shield Drawing had been drawn in its exact form in 1995. First, the Shield Drawing was a finished drawing, as distinct from the preliminary nature of the other drawing. Second, two witnesses testified that in 1995, Bouchat gave them copies of the Shield Drawing as Christmas presents in December, 1995.[21] As to the Bird and Lightening Drawings, there was no such evidence. Therefore, as to the Bird and Lightening Drawings, the jury could, and did, conclude that Bouchat had not carried his burden of proving that these *exact drawings* had been created in 1995.

In this context, the jury properly answered the questions presented as to the faxing of the Shield, Bird, and Lightening Drawings. The question as to each such Drawing was:

> Has Plaintiff proven by a preponderance of the evidence that he successfully faxed as copy of [the exact drawing in the Copyright application] to the office of the Maryland Stadium Authority on April 1 or April 2 of 1996?

By virtue of the finding that Bouchat had not proven that he drew either the Bird Drawing or Lightening Drawing in 1995, the jury would likely[22] have found that Bouchat had not proven that, at the time of the faxing, he had sent an exact copy of the Bird or Lightening Drawings as such drawings appeared in the later copyright applications. Even if the jury believed that Plaintiff had sent some version of the sketches of the Bird and Lightening Drawings to the Maryland Stadium Authority, if they did not find that what he sent was an exact copy of the drawings contained in the copyright applications, they had to answer "no" to the above-posed

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[21] *See supra* note 4, and accompanying text.

[22] If not necessarily.

question. Hence, the findings of "yes" as to the faxing of an exact copy of the Shield Drawing as presented in its copyright application, and "no" as to the faxing of an exact copy of the Bird and Lightening drawings as presented in their copyright applications, are not inconsistent.

Further, it should be noted that there were four successive faxings. Plaintiff testified that he first faxed only P1. Ex. 7 (the Shield Drawing with message) , and that once he viewed code "101" on the fax machine, he assumed that the fax was successfully sent.[23] Having received that message, Plaintiff proceeded to fax P1. Ex. 6 (the Shield Drawing without the message) and then the Bird and Lightening Drawings. Tr. at 1001-03. Hence, it would be possible to reasonably conclude that some, but not all, of the faxes were successfully sent.

D. Independent Creation

Defendants next argue that they are entitled to judgment as a matter of law because it was unreasonable for the jury to conclude that NFLP did not independently create the Ravens' Shield Logo. The Court cannot agree. The issue presented was one turning upon the credibility of Defendants' witnesses and the inferences reasonably drawn from the evidence. The jury did not have to believe Defendants' witnesses and did not have to view the evidence as Defendants wish.

Defendants established that NFLP's designers engaged in a creative process, but they did not establish that, necessarily, their creative process resulted in the creation of the Shield Logo without copying from Bouchat's Shield Drawing. Indeed, it was quite reasonable for the jury to find that the appearance of the Ravens' Shield Logo was the result of post-April 1 or 2 access to, and copying from, Bouchat's Shield

[23] Plaintiff testified that Drabek had explained to him that "101" meant that the fax had been successfully transmitted.

Drawing.[24] A *careful* examination of Defendants' evidence of the asserted design process will disclose the weakness of their contention that the jury necessarily had to find that the NFLP independently created the Ravens' Shield Logo without copying from Bouchat's Shield Drawing.

As the case was tried, the issue of priority was paramount. Each side contended that its original work was copied by the other. As Dr. Steven Sheehan, Defendants' expert witness testified, "[t]here are elements in both designs that are so similar that they are so connected that they could not have been developed independently from one another." Tr. 1915.[25] The jury, with good reason, decided that the Plaintiff had proven that the Shield Drawing was created before the Shield Logo. The jury found, also with good reason, that the Plaintiff proved that Defendants did not create the Shield Logo independent of the Shield Drawing.

3. Striking Similarity

Even if the Plaintiff had failed to prove access, he would still prevail in this case buy virtue of the striking similarity of the Ravens' Shield Logo to his earlier created Shield Drawing.

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[24] Defendants cannot, for example, point to any drawing or sketch created prior to April 2 that is *definitely* (without a good deal of artistic license) a preliminary sketch of the Ravens' Shield Logo.

[25] Sheehan's testimony was intended to support Defendants' position that Bouchat prepared his Shield Drawing after examination of the NFLP Ravens' Shield Logo publicly released on June 6, 1996. Nevertheless, his expert opinion (with which Plaintiff's expert agreed) can reasonably be interpreted to mean that *someone* copied, not just that Plaintiff copied. This is consistent with the stark evidence provided by a side-by-side comparison of Defendants' Logo and Plaintiff's Drawing. Therefore, the real question in this case could well be viewed as deciding who was the copier, Bouchat or NFLP. The jury reasonably decided that it was NFLP.

In the absence of direct evidence of copying, which is rarely available in copyright infringement cases, a plaintiff may raise an inference of copying by establishing that Defendants had access to his work. The quantum of proof a plaintiff must produce in order to establish access depends upon which theory he chooses to rely. In all circuits, an infringement plaintiff can establish access using the "substantial similarity" test. Under the Fourth Circuit's formulation of the substantial similarity test, a plaintiff must demonstrate: (1) that Defendants had an opportunity to view or copy his work; and (2) that the two works are "substantially similar." *Towler v. Sayles*, 76 F.3d 579, 582 (4th Cir. 1996).

In some circuits,[26] however, a plaintiff may relieve himself of his affirmative burden of proof of access by relying on the striking similarity doctrine, which applies only if "the two works are so strikingly similar as to preclude all reasonable possibility of independent creation." *Gaste v. Kaiserman*, 863 F.2d 1061, 1068 (2d Cir. 1988), *quoting Ferguson v. National Broadcasting Co.*, 584 F.2d 111, 113 (5th Cir. 1978).

As the Second Circuit has noted, when a plaintiff relies on striking similarity, "[a]lthough striking similarity can raise an inference of copying, that inference must be reasonable in light of all the evidence. A plaintiff has not proved striking similarity sufficient to sustain a finding of copying if the evidence as a whole does not preclude any reasonable possibility of independent creation." *Gaste*, 863 F.2d at 1068.

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[26] *Repp v. Webber*, 132 F.3d 882, 889 (2d Cir. 1997), *citing Lipton v. Nature Co.*, 71 F.3d 464, 471 (2d Cir. 1995) and *Gaste v. Kaiserman*, 863 F.2d 1061, 1067-68 (2d Cir. 1988); *Ty, Inc. v. GMA Accessories, Inc.*, 132 F.2d 1167, 1169-70 (7th Cir. 1997).

In this case, the jury found that "the Ravens's shield logo is so strikingly similar to Plaintiff's shield drawing (Plaintiff's Exhibit 6) that there is no reasonable possibility of independent creation of the Ravens's shield logo." Special Verdict Form I.C.2.

This finding was reasonable in light of the evidence, which includes the very high degree of similarity (indeed identity) of the two works despite the many design choices the NFLP had in creating the Ravens' Shield Logo, as well as the absence of any genuinely persuasive evidence of independent creation by NFLP.[27]

In *Towler v. Sayles*, 76 F.3d 579 (4th Cir. 1996), a copyright infringement plaintiff alleged that the defendant had copied her screenplay. The district court granted Defendant's motion for judgment as a matter of law at the close of Towler's evidence, concluding that the plaintiff had failed to produce evidence that "even approach[ed] [the] . . . exacting standard of [substantial similarity]." *Id.* at 585. In affirming the district court's decision, the Fourth Circuit expressly declined to announce whether the striking similarity doctrine is available to infringement plaintiffs (as an alternative to substantial similarity) in this circuit as it is in some other circuits. In discussing the split among the Circuits, the Fourth Circuit stated "[w]e need not, however, join this debate, for [plaintiff] did not prove striking similarity between [the two screenplays] [because those circuits that have adopted the striking similarity test] require proof of striking similarity that precludes the 'possibility of independent creation[,]'" *Id.* at 585-86, "which plaintiff's evidence clearly did not do." *Id.*

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[27] As noted above, there was evidence that NFLP engaged in a creative effort. There was no evidence, however, that demonstrated that the creation of the particular design at issue, the Shield Logo, which is virtually identical to the Shield Drawing, was solely the result of such a process carried out without copying from Bouchat's Shield Drawing.

Defendants, relying upon *Takeall v. Pepsico, Inc.*, No. 93-1237, 1993 WL 509876, at *4 (4th Cir. Dec. 8, 1993) (unpublished disposition) (*"Takeall II"*), argue that the Fourth Circuit has rejected the strikingly similar doctrine. First of all, *Takeall II* is an unpublished decision and thus lacks precedential value. Moreover, even if it had been a published decision, *Takeall II* should not be read as a repudiation of the strikingly similar doctrine.

At the present stage of the law, this Court must predict what the United States Court Of Appeals for the Fourth Circuit will decide regarding the strikingly similar doctrine. This Court predicts that the Fourth Circuit will follow the rationale of the Second Circuit [28] as reflected in *Gaste*. Therefore, the Plaintiff would prevail under the strikingly similar doctrine if it were necessary for him to rely upon that doctrine.

This Court, having recognized the unresolved legal issue, presented the case to the jury so as to obviate the need for a new trial regardless of the Fourth Circuit's view of the strikingly similar doctrine. Thus, the jury was asked questions designed to yield a verdict applicable whether or not the doctrine was adopted. At trial, the jury found that Plaintiff proved substantial similarity and a reasonable possibility of access. Hence, Plaintiff would prevail without reliance on the strikingly similar doctrine. The jury finding that Plaintiff proved striking similarity and the absence of any reasonable possibility of independent creation would be superfluous in light of the finding of substantial similarity and reasonable possibility of access. Therefore, Plaintiff prevails whether or not the Fourth Circuit accepts the strikingly similar doctrine.

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[28] Or, at least, consider the degree of striking similarity as a factor in determining the reasonable possibility of access.

D. Coercive Jury Instruction [29]

Defendants assert that they are entitled to a new trial because the Court gave the jury coercive instructions. Defs. Mem. at 20.

The Fourth Circuit has stated that "the district court is obligated to instruct fully the jury [and] once a jury makes known its difficulty [in reaching a verdict], it is the duty of the judge . . . to give such supplemental instructions as may be necessary." *Bristol Steel & Iron Works*, 41 F.3d at 191 (internal quotations omitted). Such a supplemental instruction may not be coercive. To determine whether the supplemental instruction was coercive, "the totality of the circumstances is considered. Factors entering the calculus for resolving this issue include jury deadlock, compromise of the individual juror's convictions, colloquy between the district court and the foreman, limitations on the length of the deliberations, and the obnoxious nature of the charge." *Id.* (internal quotations and citations omitted).

On October 28, 1998, at approximately 4:30 p.m., the jury began its deliberations. At approximately 5:00 p.m., the jury was excused until the following day, October 29, when it sought clarification of wording of certain sections of the special verdict form.

On October 30, 1998 at 1:20 p.m., one and a half days into its deliberations, the jury advised the Court by note: "WE CANNOT REACH A VERDICT + REQUEST YOUR ADVICE / INSTRUCTION." *See* Defs. Mem. Ex. E. After meeting with counsel, the Court convened the jury at 2:05 p.m. and gave them a standard supplemental instruction

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[29] Although the cases cited by the parties, and relied on by the Court, in addressing the coerciveness issue largely involve instructions given in criminal trials, the Fourth Circuit has held that they are fully applicable in civil contexts. *Orthopedic Equip. Co. v. Eustler*, 276 F.2d 455, 462 (4th Cir. 1960).

commonly referred to as an "Allen charge." Tr. 2311-15. Specifically, the Court told the jury in pertinent part:

> "[you are quite properly an advocate at this point for whatever position you think is right in the case and that is fair because that is the role of the jury, but if we select another jury, it is not going to be any wiser than you."

Tr. 2312-13. The judge further stated:

> "I can't suggest and I don't suggest any of you surrender your conscientious belief about this case. I wouldn't want anybody here to agree upon a verdict unless you can say, yes, I agree with it. That is you actually concluded that the verdict is correct based on the evidence and the law as I have instructed you. But as I mentioned before[,] you do have a duty to discuss the case fully, consider each other[']s views with an open mind, and change your views if the discussion leads you to do so."

Tr. 2313.

As part of that instruction, the Court requested that the jury provide a written report by 4 p.m. that day.

At approximately 3:45p.m., the jury requested the Court's permission to reconvene on November 3, 1998 for further deliberations, which was granted. Tr. 2315.

When the jury reconvened on November 3, 1999, it sent the Court a note in the late morning that stated:

> WE HAVE ONE JUROR WHO HAS REFUSED TO FURTHER DELIBERATE BY EXPLAINING HIS/HER POSITION OR BY CONSIDERING THE VIEW POINTS OF OTHERS. JUST SIMPLY HAS HIS/HER VIEW + THAT'S THAT. MOREOVER, HE/SHE REFUSES TO ACCEPT THE COURT'S INSTRUCTION THAT CIRCUMSTANTIAL EVIDENCE IS SUFFICIENT TO SUSTAIN A PARTY'S

> BURDEN OF PROOF. AS SUCH, FURTHER EFFORTS ARE FRUITLESS + WE REQUEST YOUR FURTHER INSTRUCTION.

Defs. Mem. Ex. H; Tr. 2319.

Over the objection of Defendants, the Court responded to the note by reconvening the jury and giving a second supplemental instruction. The Court told the jury:

> I will ask you to go back. First of all because your lunch has come anyhow and secondly, if the question relates to—there is a debate about the instructions, I can solve that debate, because you are bound by the instructions, But I really want to emphasize another thing. And that is the evaluation of the evidence is yours. Yes, it would be nice if there is [a] unanimous decision and the people reach a verdict, but as I said in the instructions if the problem or lack of agreement stems from a conscientious disagreement of what the evidence is or what the evidence persuades you, then that is your business. I would not ask anybody to give up his or her conscientious belief of what the evidence establishes or doesn't establish just to reach a verdict. That is not, it is not a legal requirement to give a verdict that you don't a hundred percent agree with, and I hope that is clear.

Tr. 2322-23.

The Court also told the jury:

> I am not going to keep you here beyond the point of usefulness. You have done everything that you can. So for right now, in as much as we owe you the lunch anyhow and it is coming, but also please go back, please if necessary, either listen to the instructions or send us a note, and let me know whether there [are] any questions or what the situation is. I appreciate everyone of you. I know that everybody in there has had an open mind and

has reached whatever conclusions that they now hold conscientiously and if that is the way it is, we will have to see.

Tr. 2323.

Later that day (November 3) , having heard nothing further from the jury, the Court sent the jury a memo requesting that it inform the Court about its scheduling requests. The memo stated:

> We wish to accommodate your scheduling desires to the extent possible. It appears that:
>
> 1. You may reach a verdict sufficiently soon to decide to continue while we just wait.
> 2. You may decide to adjourn at 5:00 or 5:30 (or another time of your selection) and return tomorrow at a specified time—I suggest 9:30—to continue deliberations.
> 3. You may have some other desire.
>
> It is important for us to know what you wish to do as early as possible. Accordingly, please let me have a response promptly so that we can do our best to accommodate you.

Defs. Mem. Ex. I.

After several minutes, the jury responded with a note that stated: "GIVE US TO 5:30 AT THE LATEST—PROGRESS IS BEING MADE." Defs. Mem. Ex. J. Shortly thereafter, the jury returned a verdict, finding that Defendants had copied Plaintiff's Shield Drawing, but that they had not copied Plaintiff's Bird and Lightening Drawings.

In the instant case, the Court's first supplemental instruction, on October 30, was balanced and fair. Moreover, the Court's second supplemental instruction, given to the jury after a four day recess during which deliberations were

suspended, although not a verbatim repetition of its earlier *Allen* charge, was equally balanced and fair.

There was nothing unbalanced about the instructions as a whole or any portion thereof. This Court did not coerce, or in any way unfairly influence, the jury to reach its verdict.

## IV. CONCLUSION

For the foregoing reasons:

1. Defendants' Motion for Judgment as a Matter of Law Notwithstanding the Jury Verdict is DENIED.
2. Defendants' Motion for a New Trial is DENIED.
3. Defendants shall promptly file a petition seeking certification of the case for interlocutory appeal to which Plaintiff shall respond within seven days of receipt of a copy.
4. Plaintiff shall promptly arrange a conference (which can be attended in person or by telephone) regarding further procedures in this case.

SO ORDERED this 19th day of February, 1999.

/s/ Marvin J. Garbis
MARVIN J GARBIS
United States District Judge

## APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

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MJG-97-1470

---

FREDERICK E. BOUCHAT,
*Plaintiff*,

v.

BALTIMORE RAVENS, INC., *et al.*,
*Defendants*.

---

CERTIFICATION ORDER
PURSUANT TO 28 U.S.C. § 1292(b)

It is this 1st day of April, 1999 by the United States District Court for the District of Maryland,

ORDERED, that the following questions and statements of facts are hereby certified to the United States Court of Appeals for the Fourth Circuit. The particular phrasing used in the certified questions is not intended to restrict appellate consideration of the issues presented as the appellate court perceives them in its analysis of the facts herein stated and the parts of the record herein included. The appellate court is free to amend or reformulate the questions to the extent it deems necessary for the proper resolution of this case.

QUESTIONS

1. Was Plaintiff's proof of a reasonable possibility of access legally insufficient?

2. If so, will the Fourth Circuit adopt the "strikingly similar" doctrine as expressed in *Gaste v. Kaiserman*, 863 F.2d 1061, 1068 (2d Cir. 1988)?

3. Should the copyright infringement claim be dismissed because the Plaintiff failed to note the derivative nature of Shield Drawing on the application for copyright where Defendants have not proven fraud or a purposeful failure to advise the copyright office of facts that might have caused rejection of the application?

4. Did the Court improperly coerce the jury to reach its verdict?

## CASE SUMMARY AND DISCUSSION

The Court adopts herein, by reference, the Memorandum and Order of February 19, 1999 attached hereto as Appendix A. As stated in the Memorandum and Order re Interlocutory Appeal issued this date, if the United States Court of Appeals for the Fourth Circuit should choose to view the case as presented by the Defendants, then outcome determinative unresolved questions of law could be presented. Moreover, regardless of the outcome on appeal, an immediate appeal probably will materially advance the ultimate outcome of the litigation.

## RECORD SUBMITTED

Without restricting the United States Court of Appeals for the Fourth Circuit from obtaining additional documents from the Clerk, the record on appeal shall include the following:

1. The Transcript of trial proceedings, and

2. All Exhibits offered in evidence at trial.

The parties are free to supplement the record on appeal by providing the appellate court with copies of any other pertinent documents that were filed in the instant case.

## DESIGNATION OF PARTIES

Defendants shall be treated as Appellants and Plaintiff shall be treated as Appellee in the certification procedure.

/s/ Marvin J. Garbis
MARVIN J. GARBIS
United States District Judge

jrw

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT
LEWIS F. POWELL. JR. UNITED STATES
COURTHOUSE ANNEX
1100 EAST MAIN STREET, SUITE 501
RICHMOND, VIRGINIA 23219-3517

PATRICIA S. CONNOR,
CLERK

TELEPHONE
(804) 916-2700

April 12, 1999

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HOGAN & HARTSON
111 South Calvert Street
Baltimore, MD 21202

Re: 99-663 Bouchat v. Baltimore Ravens Inc
CA-97-1470-MJG

Dear Counsel:

We docketed the petition for permission to appeal under 28 U.S.C. 1292(b) on April 12, 1999.

The respondent may file an answer to the petition. The answer must be in the office of the Clerk by April 19, 1999.

Respondent must file the enclosed disclosure of corporate affiliations and financial interest form by April 19, 1999.

The Local Rules of the Fourth Circuit are available on both Lexis and Westlaw and in Chapter 28 of the United States Code Annotated and United States Code Service. The Local Rules are also available on the Court's electronic bulletin board, known as ABBS. You may obtain an account number for ABBS by calling the PACER Service Center at 1-800-676-6856. The telephone numbers for local printing companies that will provide a copy of the Local Rules at no charge may be obtained by calling the Clerk's Office at (804) 916-2700.

If you desire to inquire about your case by telephone, please contact me directly by dialing (804) 916-2704. Questions concerning briefing should be directed to the briefing section at (804) 916-2707.

Yours truly,

PATRICIA S. CONNOR
Clerk

By: /s/ Sandra J. Crumpton
SANDRA J. CRUMPTON
Deputy Clerk

cc: Frank L. Monge

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

[Filed May 14, 1999]

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No. 99-663
CA-97-1470-MJG

---

FREDERICK E. BOUCHAT,

*Respondent*,

v.

BALTIMORE RAVENS, INCORPORATED;
NATIONAL FOOTBALL LEAGUE PROPERTIES,
INCORPORATED,

*Petitioners*.

---

ORDER

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Petitioner has filed a petition for permission to appeal an interlocutory order pursuant to 28 U.S.C. 1292(b).

The Court grants the petition for permission to appeal.

For the Court,

/s/ Patricia S. Connor
By: PATRICIA S. CONNOR
Clerk




Fred Goodwat.

PLAINTIFF'S EXHIBIT 3




Excerpt from Defendants' Exhibit 45

© Fred Bouchat
Dec. 5-1995

PLAINTIFF'S EXHIBIT 2




Fred Bouchet.
PHONE #
685-1098
PLEASE CONTACT
ME IF HE USES IT
WORK NUMBER.
333-2780 ORIG?
THANK YOU.

TOM R JOHN
MOAG
I WOULD
LIKE YOU
TO SEND
THIS
TO MR MOOG
AND SEE
IF HE WOULD
LIKE THIS
DESIGN

© Fred Bouchet IF HE does
DEC 5 1995 USE IT I WOULD
LIKE A LETTER.
OF RECOGNITION
AND IF THE TEAM HE
WANTS TO I WOULD LIKE A
AUTOGRAPH

PLAINTIFF'S EXHIBIT 7



By Fred Bouchat.

PLAINTIFF'S EXHIBIT 4A

**APPENDIX E**

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF
MARYLAND/NORTHERN DIVISION

---

MJG 97-1470

---

FREDERICK R. BOUCHAT,
*Plaintiff,*

v.

BALTIMORE RAVENS, INC., *et al.*,.
*Defendants.*

---

December 29, 1998

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TRANSCRIPT OF MOTIONS HEARING
BEFORE THE HONORABLE MARVIN J. GARBIS
UNITED STATES DISTRICT JUDGE

---

APPEARANCES:
ON BEHALF OF THE PLAINTIFF:

Howard Schulman, Esquire

ON BEHALF OF THE DEFENDANTS:

Robert L. Raskopf, Esquire
George Beau, Esquire

REPORTED BY:

Jacqueline Sovich, RPR, CM
Official Court Reporter

[116] THE COURT: How about the argument that their expert's opinions were based on a little more than just—just the similarity, the wings, but also they were making comments about Mr Bouchat's talent, his abilities, that sort of thing, that he couldn't have drawn this independently, he didn't have the skill?

MR. SCHULMAN: That' s correct. They're saying he could not have.

THE COURT: And, I might add, when you look at his bird sketch, there is a difference in style between the feathers at the bottom and the wing. There's a difference in quality. The wings gets an A, and the bottom gets something else.

MR. SCHULMAN: In response to the Court's question that if, going back to their experts, they said two things they said, and if you look even at the Ziegler's testimony that we quote, he says that they could not have been done independently of one other, because the similarity of the elements, that's one aspect of what they say.

The second aspect is they go and conclude, because the point the Court is pointing to, in terms of the inconsistency in style, the difference in sophistication, the matters that the Court just pointed to, therefore we conclude, based on that, that Bouchat—

* * * *

[134]

I, Jacqueline Sovich, RPR, CM, do hereby certify that the foregoing is a correct transcript from the stenographic record of proceedings in the above-entitled matter.

/s/ Jacqueline Sovich
Jacqueline Sovich Date
Official Court Reporter

TRIAL DAY 10
VOLUME 2 of 2

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF
MARYLAND/NORTHERN DIVISION

---

CIVIL ACTION
MJG 97-1470

---

FREDERICK R. BOUCHAT,

*Plaintiff*,

v.

BALTIMORE RAVENS, INC., *et al.*,.

*Defendants.*

---

Baltimore, Maryland
October 21, 1998

---

REPORTER'S OFFICIAL TRANSCRIPT OF PROCEEDINGS BEFORE:

THE HONORABLE MARVIN J. GARBIS

(and a jury)

APPEARANCES

On Behalf of the Plaintiff:

Howard Schulman, Esquire

On Behalf of Defendants:

John Paul Reiner, Esquire
George Beau, Esquire
Marc Ackerman, Esquire

Reported by:

Betty Lou Walls, RPR

[1784]

INDEX

| Witness: | Direct | Cross | Redirect | Recross |
|---|---|---|---|---|
| Jonathan Seeman | 1785 | 1793 | 1807 | |
| Beth Henry | 1807 | 1813 | | |
| John Moag | 1820 | 1833 | | |
| Craig Ziegler | 1845 | 1859 | 1871 | 1871 |
| Steven Sheehan | 1873 | | | |

* * * *

[1825] time, physically more into the body of the office as opposed to that back room.

Q You have—

A And you could certainly hear him when he was there.

Q He is gregarious and friendly?

A Yes.

Q You have said in your role as chairman of the Maryland Stadium Authority there was no involvement with any creative issues like logo designs for the Ravens, correct?

A No, sir.

Q Did you ever receive suggestions from members of the public with respect to the team name or artwork for the logos?

A Lots.

Q What would become of those lots of suggestions or submissions?

A Well, everything you can imagine would come into the office. Realtors who would want to rent them houses or sell them houses, accountants who wanted to represent them, people who had ideas for names of the team, people who had ideas for what the stadium ought to look like. You name it, it came into the office, because, you know, there was [1826] a period of time where people knew of my involvement and I kind of became a solicitation point. Anybody who wanted anything out of the team or was trying to get involved with

them in any way, shape or form, getting a job, getting tickets, trying to sell them on some idea. I saw it all.

I made a decision fairly early on with my secretary that we were not going to get involved in the business of passing these things on to the team. I didn't want to be the solicitation point. I didn't want to be the funnel of people trying to reach the team. I had a role as chairman of the Stadium Authority and didn't feel that was appropriate to get involved in.

Q To the best of your knowledge—

A I think a lot of it was thrown away. There were some phone calls that were answered but the volume was so intense, it was at some point hundreds of inquiries a week, getting down to dozens, impossible to respond to, and, again, I didn't—I saw real fine delineations in what my job was as chairman of the authority and how I would interact with the team and I never wanted to get in a position of, having been involved in bringing them here, I was then trying to tell them [1827] how to do their business. I instructed my secretary early on that unless for a political reason or something that somebody that to be responded to, that these were not going to be passed on to the team. Politically handle what we can but also feel free to throw, frankly, some of it away, because we did receive a lot of crazy stuff, frankly.

Q Do you recall ever seeing any submissions from Mr. Bouchat?

A No, I do not. I remember meeting Mr. Bouchat but I don't remember receiving anything from him.

Q What were the circumstances of the meeting with Mr. Bouchat. It has already been testified in this case that there was a photo session at your office on Thursday, March 28, 1996.

A I'm a little bit hazy on exactly how it was set up because I can't remember whether Mr. Conti, Gene Conti, who was the secretary of the Department of Labor, Licensing and Regulation at the time, called me or whether his secretary

had called my secretary and she came in. But in any event, I know a request came in from him. To the best of my recollection I think it was that the gentleman had been an employee of the week or employee of the [1828] month, something like that, and that would I mind having my picture taken with him for the department's newsletter, and I said sure, I would be glad to do that, and he came by and we took a picture.

Q How long did that particular picture taking session last?

A Very short. And it stands out in my memory, frankly, because it was so short. It occurred in the conference room, which was down the hall from my office, and I went in there and I shook their hands and we took a picture and I left.

Q Did Mr.—

A . I remember my secretary said that was the shortest one you've had, and that just kind of stands out.

Q Did Mr. Bouchat have anything with him at the meeting?

A He did. He had a little helmet like they used to give away at Crown Central Gas, I think, something that looked like that (indicating).

Q Let's talk about what that is. That is Plaintiff's Exhibit l0B. Does that appear to be the helmet that Mr. Bouchat had with him? 4B, I'm sorry.

[1829] A I can't recall this as any specific thing. What I remember was he is a big man and he was holding this little helmet and that stuck out because he is a big strapping guy and he was standing there holding this tiny helmet down in his hand. I remember looking at it and seeing it and thinking those are what they used to give away at the gas stations for an extra buck or something. But I don't recall any detail of the helmet itself.

Q Did Mr. Bouchat have anything else with him at that meeting?

A No, he did not.

Q What did you bring with you to the meeting, if anything?

A I think I just walked in the room.

Q Do you recall having any discussion with Mr. Bouchat about any drawings that he may have made?

A No. I really don't. I don't recall any conversation other than a kind of exchange of pleasantries when I walked in. We sat there and took a picture really quick and shook hands and then I walked back out.

Q Did you at any time encourage Mr. Bouchat to submit any drawings or any of his artwork to you?

A No, I don't recall that. I don't recall any [1830] discussion about any artwork. Again, I don't recall much at all other than hi, how are you, nice taking a picture with you.

Q Was there any discussion that you can remember about your telephone number or your fax machine number and his getting access to both of those telephone numbers?

A No. I can barely remember our main number, let alone our fax number anyway. But no, there was none of that.

Q I was referring to the fax numbers at the Maryland Stadium Authority. Did he say anything to you about getting the fax numbers for the Maryland Stadium Authority?

A No.

Q Do you know what the fax numbers of the Maryland Stadium Authority are?

A I haven't the faintest idea.

Q Before this particular photo session had you ever had any contact with Mr. Bouchat?

A I had none.

Q Following the meeting, what contact, if any, did you have with Mr. Bouchat?

A None.

Q Following the meeting—and there was another

* * * *

[1832]

Q That's the picture that you remember somebody sending to you?

A Uh-huh. There's a little helmet.

Q Let me ask you to look at some other documents, Mr. Moag. Put that one aside. Would you look, please, at what has been identified as Plaintiff's Exhibit Number 7, Plaintiff's Exhibit Number 6, Plaintiff's Exhibit Number 8B and Plaintiff's Exhibit Number BA?

(Pause for document examination.)

A Yes.

Q Prior to your deposition in this case had you those documents?

A No, I saw them during the deposition when they presented to me but not before.

Q You're positive about that?

A Yes.

Q You are positive that those particular documents were never in your position?

A I have never seen them, again, until the deposition. You know, had they come in, my eyes never saw them, so.

Q Have you ever had any communication with anyone at National Football League Properties concerning the designs for the logo that appear in—

[1891]

* * * *

## CERTIFICATION

I, Betty Lou Walls, hereby certify that I was the Official Court Reporter present during the foregoing proceeding and that this verbatim transcript is true and accurate. The proceeding was taken by me in machine shorthand and this verbatim transcript was subsequently prepared by me utilizing the ECLIPSE Computer-Aided Transcription system.

Betty Lou Walls, RPR, Notary Public
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Baltimore, Maryland 21201
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## APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

---

MJG 97-1470

---

FREDERICK E. BOUCHAT,
*Plaintiff,*

vs.

BALTIMORE RAVENS, INC., *et al.*,
*Defendants.*

---

[2112]

Trial was continued in the above referenced case on October 28, 1998 before the Honorable Marvin J. Garbis, and a Jury.

APPEARANCES

For the Plaintiff:

Howard J. Schulman, Esquire

For the Defendants:

George Beall, Esquire

John Paul Reiner, Esquire

Marc Ackerman, Esquire

Adam Gahtan, Esquire

Reported by:

Barbara J. Shaulis, Court Reporter

[2113]

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* * * *

[2137] Mr. Anders, an expert called by the plaintiff. Mr. Anders was qualified by the Court as an expert competent to give his opinion about similarities and/or differences in the drawings alleged by plaintiff to constitute his original artwork and the designs created by NFL properties graphic designers for use by the Baltimore Ravens. Mr. Anders also gave his opinions on the matter of order of creation of various works, and the likelihood that the designs were independently created.

During the course of his testimony, Mr. Anders made certain remarks concerning the propensity of Asians to copy works of art. Mr. Anders based his assertions in this regard on a purported knowledge of Asian culture. Mr. Anders was not qualified as an expert in the field of Asian or any other culture. He was not competent for the purposes of giving evidence in this trial to testify about the cultural, racial, ethnic or other group based propensities or characteristics. Nor were his opinions about Asians based on the required scientific foundations. You must not make any finding of fact nor lend any credibility to any opinion given in this case that is based on racial, cultural or ethnic stereotypes. Doing so would be repugnant to the value that lies at the [2138] core of our system of justice. There has been evidence in this case regarding the reliability of dates reflected in certain computer files, however, there is no evidence and there is no allegations that anyone deliberately tampered with, changed or falsified any date in a computer file

Let me now turn to the substance of the case provides to authors and artists of original works against infringing use of their work by others.

In this case, the plaintiff alleges that the defendants have infringed his copyrights in 3 drawings, namely the shield drawing, Exhibit 6, which I am just holding up so you know what I am talking about, the bird drawing of Plaintiff's Exhibit 8A and the bird drawing of Plaintiff's Exhibit 8B.

The defendants deny that they have infringed any copyright the plaintiff may have in these 3 drawings.

To prevail on his claim of copyright infringement, the plaintiff must prove by a preponderance of the evidence that he is the owner of a valid copyright in each of the 3 drawings, and that the Baltimore Ravens' logos were substantially copied from Plaintiff's Exhibits 6, 8A and 8B.

* * * *

[2238] it. Didn't think he would need it. In retrospect, obviously he would keep it.

It is like Rhonda Kim when she threw hers away. You will hear the defendants rant and rave he has no transmission report, and there are individual transmission reports I pointed out to you that the station kicked out, but as Rhonda Kim, why would she keep that she put her hand up and said why would I keep that.

After that, Mr. Bouchat hears nothing. How do. we know the fax went through. Well, we got, we saw a transmission in court that said it went through. It is okay. We know because of this, and you can infer from the striking similarity that it did get through.

Here is this fax transmission receipt right here, right there is the transmission receipt, I am using a little bit of literary license.

Now, what was the channel of communication. Maryland stadium Authority fax number, the Maryland stadium Authority, he thinks he is faxing it to Mr. Moag who has his office in the Maryland stadium Authority. Well, it went to a number 333-1888, and that particular number was the number, yes, for the the Maryland stadium Authority, but not where Moag and the Ravens had their offices, it was across the street—

* * * *

[2309]

## CERTIFICATE

- I, Barbara J. Shaulis, Official Reporter for the United States District Court for the District of Maryland, appointed pursuant to the provisions of Title 25, United States Code, Section 753, do hereby certify that the foregoing is a true and accurate transcript of the proceedings made in the aforementioned and numbered case on the date hereinbefore set forth, and I do further certify that the foregoing transcript has been prepared by me or under my supervision.

/s/ Barbara J. Shaulis
BARBARA J. SHAULIS
Court Reporter
Date: 10-28-98

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

---

MJG 97-1470

---

FREDERICK E. BOUCHAT,
*Plaintiff*,

vs.

BALTIMORE RAVENS, INC., *et al.*,
*Defendants*.

---

Trial was continued in the above referenced case on October 30, 1995 before the Honorable Marvin J. Garbis, and a Jury.

APPEARANCES

For the Plaintiff:

Howard Schulman, Esquire

For the Defendants:

George Beall, Esquire

John Paul Reiner, Esquire

Marc Ackerman, Esquire

Adam Gahtan, Esquire

Robert Raskopf, Esquire

Reported by:

Barbara J. Shaulis, Court Reporter

October 30, 1998

[2311] (Jury entered the courtroom at 2:05 p.m.)

THE COURT: First of all, the first thing you deserve is our appreciation, my personal appreciation for all of your effort and your time, and I request for a little bit more of your time, but I know how hard you have worked.

I know that you have had a fair debate, and an interesting debate, and one at this point that has not yielded a unanimous verdict, but I want to ask you for a little more help, and I think you all understand that what we have all gone through to get this case presented to you and presented to you the best that we can.

I have got to give you these supplemental instructions, and you already have my full instructions that are on tape. The first thing I want to mention is that if you will find it at all useful, there is no problem, and everybody is agreed, I can give you the substantive instructions, that is on tape, I can give those to you in written form if you would like that. You would just have to ask for it and that would be fine.

I don't know how you now stand on any of the questions that are presented, and I am really glad [2312] that I don't, because I don't want to be telling you anything about what you should do. But I want you to see if there is any way consistent with my instructions it is possible for you to reach a unanimous verdict. I can't give you a part of the instructions now that highlight, if you haven't asked any questions, I don't want to highlight any part of the instructions, but I mention to you if you wish to have all the substantive instructions, they can be produced for you in writing very easily, but what I wanted to tell you as I told you at the beginning of this case, this is a dreadfully important case to both sides. If at the end of the day, the end of the deliberations you cannot reach a unanimous verdict, we are left with a case that is open, that is undecided, and frankly we have to try again.

I don't have the slightest reason to believe this case could ever be presented better by either side, that it was presented to you in this case. None of you had an interest in this case, financial interest or concern about who won when you started, and none of you has an interest in the outcome of the case, you are not an advocate for either side. You are quite properly an advocate at this point for whatever position you think is right in the case and [2313] that is fair because that is the role of the jury, but if we select another jury, it is not going to be any wiser than you. It is not going to be any fairer than you, and they are not going to have any different evidence before them then you have now.

I can't suggest and I don't suggest any of you surrender your conscientious belief about this case. I wouldn't want anybody here to agree upon a verdict unless you can say, yes, I agree with it. That is you actually concluded that the verdict is correct based on the evidence and the law as I have instructed you. But as I mentioned before you do have a duty to discuss the case fully, consider each others views with an open mind, and change your views if the discussion leads you to do so.

I am asking you for me, do me a favor, more significantly for these parties. The one who prevails, the one who doesn't prevail, please make a final effort to see if an agreement can be reached. In so doing I want to make a special, a special request. Those who happen to be in the minority on questions or any question, please listen carefully to the majority and see if maybe on analysis you can conscientiously go along with the majority, on the other hand, just as fairly, those who happen to be in [2314] the majority on a given question, please listen carefully to the minority, because they may be right, and maybe if you just give it one fresh try, you can reach unanimous verdict, but again nobody should and can surrender your honest conviction about the case because of the opinion of somebody else just for the purpose of reaching a verdict.

At this point, I am going to send you back for some deliberations and please give it another try. If after such further discussion and consideration as you find constructive, you can reach a verdict upon which you all can agree, tell me and we will be happy to take the verdict. On the other hand, obviously this is not the fifteenth century and we are not going to lock jurors up, the way it happened in the days of King Henry and all that stuff. I would ask you this. Please give it a shot.

Give me a report no later than four o'clock about how you are doing, whether it is advantageous to continue, whether it would be beneficial or promising to take the weekend off, come back Monday or come back Tuesday, after you have had a chance to reflect. Give me a report, I mean in writing. The parties will get it too, so don't say how you stand, but give me a report on how things are going no later than four and [2315] the reason for no later than four, we have to discuss it with counsel and we have to reach the right decision.

Your time and your effort are precious, I don't want to waste it. I don't want to waste it by having a trial without having had a verdict. I don't want to waste it by forcing you to sit in a room and look at the wall, if you really can't reach a verdict, but perhaps you can. And we all, we all would like to have closure on it, so with that, you are excused.

Please do me the favor and everybody else the favor of giving it a try and let me have the report on the status of things no later than four. Thank you.

(Jury back out to deliberate at 2:10 p.m.)

THE COURT: Alright. Counsel, I assume nobody has any comments? Nobody wanted to say anything about the charge?

MR. SCHULMAN: No, Your Honor.

MR. REINER: No, Your Honor.

THE COURT: Let's adjourn.

(Court adjourns awaiting the call of the jury)

(Court resumes in open court at 3:45 p.m.)

THE COURT: Still discussing the case, need to return for further deliberations. Preference is to return on Tuesday, a.m. based on personal schedules.

* * * *

[2317]

CERTIFICATE

I, Barbara J. Shaulis, Official Reporter for the United States District Court for the District of Maryland, appointed pursuant to the provisions of Title 28, United States Code, Section 753, do hereby certify that the foregoing is a true and accurate transcript of the proceedings made in the aforementioned and numbered case on the date hereinbefore set forth, and I do further certify that the foregoing transcript has been prepared by me or under my supervision.

Barbara J. Shaulis

/s/ Barbara J. Shaulis
BARBARA J. SHAULIS
Court Reporter 11-6-98

WE HAVE ONE JUROR WHO HAS REFUSED TO FURTHER DELIBERATE BY EXPLAINING HIS/HER POSITION OR BY CONSIDERING THE VIEW POINTS OF OTHERS. JUST SIMPLY HAS HIS/HER VIEW + THAT'S THAT. MOREOVER, HE/SHE REFUSES TO ACCEPT THE COURT'S INSTRUCTION THAT CIRCUMSTANTIAL EVIDENCE IS SUFFICIENT TO SUSTAIN A PARTY'S BURDEN OF PROOF. AS SUCH, FURTHER EFFORTS ARE FRUITLESS + WE REQUEST YOUR FURTHER INSTRUCTION



IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

---

MJG 97-1470

---

FREDERICK E. BOUCHAT,
*Plaintiff,*

vs.

BALTIMORE RAVENS, INC., *et al.*,
*Defendants.*

---

[2318]

Trial was continued in the above referenced case on November 3, 1998 before the Honorable Marvin J. Garbis, and a Jury.

APPEARANCES

For the Plaintiff:

Howard Schulman, Esquire

For the Defendants:

George Beall, Esquire

John Paul Reiner, Esquire

Marc Ackerman, Esquire

Adam Gahtan, Esquire

Robert Raskopf, Esquire

Reported by:

Barbara J. Shaulis, Court Reporter

[2321] point.

THE COURT: I appreciate the fact that you have to take that legal position, and I understand it. Would it be helped if I concluded by saying I am not here to force you to deliberate uselessly and that if in fact a verdict can't be reached, I will have to discharge the jury. Perhaps I should add that in. I know that will not cure your problems, but would that addition help?

MR. BEALL: Your Honor, that would soften I think the affect but it would not be a complete cure, but it would be a palliative we would find helpful.

THE COURT: All right. Mr. Schulman, any additional comment?

MR. SCHULMAN: No objection, Your Honor.

THE COURT: Alright. Fine. Let's get the jury in and we will proceed.

(Jury brought into courtroom)

THE COURT: Again, I thank every single one of you for what you are doing. Let me say that the lunch is on the way. Please, it has nothing to do with anything ourselves. It is on its way.

I received your notes and a couple of things I want to say to you. First of all, I just want to be clear, the instructions that I gave you are binding as [2322] far as what the law is. I did everything I could and counsel certainly assisted in making the instructions clear.

Since you have a tape recording of the instructions as they were given, I need not repeat any part of those. If any part of them is unclear to you, you are free to ask a question, and I will do everything necessary and we will clear it up.

Because the instructions are binding, that is what the law is, and they should be clear and understandable, and if

something is not clear and understandable, that is fine. Let me know.

So I will ask you to go back. First of all because your lunch has come anyhow and secondly, if the question relates to—there is a debate about the instructions, I can solve that debate, because you are bound by the instructions, but I really want to emphasize another thing. And that is your evaluation of the evidence is yours. Yes, it would be nice if there is unanimous decision and the people reach a verdict, but as I said in the instructions if the problem or the lack of agreement stems from a conscientious disagreement of what the evidence is or what the evidence persuades you, then that is your business.

[2323] I would not ask anybody to give up his or her conscientious belief of what the evidence establishes or doesn't establish just to reach a verdict. That is not, it is not a legal requirement to give a verdict that you don't a hundred percent agree with, and I hope that is clear.

I realize that we are in a difficult stage of the case, and I think we all realize that it is very likely that the deliberations will be over today, particularly if you would tell us after going back and reviewing any question you have about the instructions, that the disagreement as to the evaluation of the evidence, I would be—and I am not going to keep you here beyond the point of usefulness. You have done everything that you can.

So for right now, in as much as we owe you the lunch anyhow and it is coming, but also please go back, please if necessary, either listen to the instructions or send us a note, and let me know whether there is any questions or what the situation is. I appreciate everyone of you. I know that everybody in there has had an open mind and has reached whatever conclusions that they now hold conscientiously and if that is the way it is, we will have to see.

[2324] Okay, counsel has to state their comments on my instructions to you, but I am going to deem that counsel has repeated what they said before unless somebody wants to supplement. Anybody want to say anything else?

MR. SCHULMAN: No.

MR. BEALL: No, the defense doesn't want to say anything.

THE COURT: Thank you. You are excused. look forward to hearing from you.

(Jury back out to deliberate at 1:25 p.m.)

THE COURT: All right. Let's get back together counsel. See you guys in a minute.

(In chambers with Court and Counsel)

THE COURT: I gather somebody wants to put something on the record.

MR. BEALL: For the defendants we had one additional observation I guess more accurately a reservation about the charge as you stated it and Mr. Raskopf is going to comment.

MR. RASKOPF: Just two things briefly Judge. First, as Your Honor knows, we didn't get an advance copy of the text of Your Honor's charge, so we really, we did react to some general observations that you had, but we did not actually see it, and that I am—

[2346]

* * * *

CERTIFICATE

I, Barbara J. Shaulis, Official Reporter for the United States District Court for the District of Maryland, appointed pursuant to the provisions of Title 28, United States Code, Section 753, do hereby certify that the foregoing is a true and accurate transcript of the proceedings made in the aforementioned and numbered case on the date hereinbefore set forth, and I do further certify that the foregoing transcript has been prepared by me or under my supervision.

Barbara J. Shaulis

/s/ Barbara J. Shaulis
BARBARA J. SHAULIS
Court Reporter 11-6-98

No. 00-1494

Supreme Court, U.S.
FILED
APR 16 2001

In The
Supreme Court of the United States

**BALTIMORE RAVENS, INCORPORATED; NATIONAL FOOTBALL LEAGUE PROPERTIES, INCORPORATED,**

*Petitioners,*

**v.**

**FREDERICK E. BOUCHAT,**

*Respondent.*

**ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT**

---

**Brief in Opposition**

---

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## STATEMENT OF THE CASE

The district court bifurcated this case between liability and damages.[1] After a five-week trial on liability and the denial of post-trial motions, this case was appealed on questions certified by the district court at the request of the petitioners, including the principal question of whether Respondent's "proof of a reasonable possibility of access [was] legally insufficient." Pet. App. 61a.

## STATEMENT OF FACTS

Respondent supplements the statement of facts set forth in the Court of Appeals opinion (Pet. App. 2a-7a) as follows:

Overwhelming evidence presented at trial corroborated Bouchat's testimony that he created his Ravens shield design (Pet. App. 69a) around December 5, 1995, six months before petitioners released their designs to the public. Among the various witnesses who testified that they saw Bouchat's design in or around December 1995 were a Deputy Secretary of the Maryland Department of Labor, Licensing and Regulation; Assistant Attorneys General; Public Information officers; fraud investigators; and other responsible public servants who worked in the building where Bouchat was employed as a security guard. JA. 41-47, 50-53, 62-63, 82-83, 126, 130-33, 226-29, 236-37, 246-48, 380-81, 561-62.[2] Many of these witnesses also testified that they saw Bouchat's preliminary designs and witnessed their progression toward his final shield design (Pet. App. 69a) of December 5, 1995. JA. 113-15, 248, 262-69, 373-75, 377-78, 1339, 1342. Bouchat introduced his work-in-progress into evidence and described in detail the

---

[1] The damages portion of the case remained stayed until February 6, 2001. Discovery has just recently begun on damages.

[2] "JA" refers to the Joint Appendix in the Court of Appeals.

process by which he developed his final design (Pet. App. 69a). JA. 463-75. Part of his work-in-progress is what the petitioners refer to as the "Garrett drawing" (Pet. App. 67a), one of several drawings that pre-dated the final shield design. Pet. App. 69a.

An Assistant Attorney General of the State of Maryland testified that he told Bouchat in mid-December 1995 to put a © on his works and date them. JA. 476-77, Tr. 458-61. On December 21, 1995, Bouchat gave an individual who worked in his building a copy of his final shield design on which he made the notation, "Merry Christmas Russ 12-21-95". JA. 282-84, 476-77, 1336. That copy was introduced in evidence as Plaintiff's trial exhibit 1, which is displayed below and attached hereto as a Supplemental Exhibit. *See* Res. App. 1a.




**Bouchat Christmas Gift to Russ, December 21, 1995**

Around Christmas 1995, Bouchat also gave a copy of the same exact drawing (Plaintiff's trial exhibit 2) to a manager of a

nearby garage. Pet. App. 69a; JA. 302-08, 1337-38. Other witnesses testified that Bouchat had this exact design prior to the end of December 1995.[3] JA. 176-77, 185, 226-29, 236-37, 380-81. Bouchat's Ravens artwork led Eugene Conti, Secretary of the Maryland Department of Labor, Licensing and Regulation, to arrange a surprise meeting with MSA Chairman John Moag on March 28, 1996, the day before the new team and the MSA jointly announced that the team would be called the Baltimore Ravens.[4]

Bouchat's testimony that Moag invited him to fax Moag his Ravens drawings was corroborated by the State Public Information Officer who was present at the meeting and took photographs. JA. 69-70, 72-73. Bouchat's testimony that he had faxed his work to Moag at Moag's invitation was corroborated by his immediate supervisor, Jan Drabeck, who testified that Bouchat had obtained permission from the head of General Services to use the fax machine for the purpose of sending his drawings to MSA, because Moag had expressed an interest in Bouchat's artwork. Approximately two weeks later, Bouchat confirmed to Drabeck that he had sent his drawings to Moag. JA. 332. Additionally, Richard Feller, a management employee working in the same building, testified that Bouchat told him at the time that he was going to send his drawings to Moag. JA. 1058-59.

John Moag, as Chairman of MSA, had an unusually close relationship with the Ravens during the precise period when Bouchat faxed his works to MSA, the same period when NFLP designers were just beginning their preliminary work on

---

[3]Others working in the building testified they saw this exact work some time before public announcement of the team's name on March 29, 1996; and, still others testified they saw it well in advance of the public unveiling of the Ravens logo in June 1996.

[4]Moag told Bouchat at the meeting that the team would be called the Baltimore Ravens.

the Ravens' logo project. Moag, as MSA Chairman, had been instrumental in negotiating and inducing the team to leave Cleveland by putting together an attractive financial package consisting in part of a new downtown Baltimore football stadium. During March and April 1996, since the team did not yet have its own office, Moag and his law firm provided the new team temporary space in their Pratt Street office rent-free. Moag's office was located in the main part of the office in close proximity to that of David Modell, the team vice-president, and other Ravens personnel. Moag testified that his office was on the same floor as Modell's and within earshot. Modell and the team had use of, and access to, the entire suite and used the law firm's telephone system, as well as its photocopy, fax and postage machines located in its work room. Modell and the team used the services of the law firm's receptionist and internal mail and fax delivery personnel. David Modell was a gregarious individual, who socialized with Moag and his secretary in the office; and team personnel shared the lunch room in the suite with the law firm's employees. JA. 392-400, 956-57, 963-64, 976, 979, 1512.

MSA offices, which are located in the Warehouse at Camden Yards, a little more than a block away from Moag's law office, acted as a mail drop and fax reception facility for the team, since it did not have its own address. MSA received mail and faxes for the Modells, the team and Moag. MSA personnel typically would sort and open any mail addressed to Moag, Modell or the team and deliver that mail to the law firm's front desk where it was sorted by the receptionist and distributed by internal messenger to Moag, Modell or the team. Likewise, the law firm's personnel in the photocopy room received faxes as they arrived and distributed them to the appropriate persons within the law firm or the new team. The evidence at trial specifically established that MSA personnel signed postal return receipts on behalf of the Modells and the team for mail containing proposed artwork submitted by the public, and they forwarded that artwork on to the Pratt Street

office. Bouchat introduced into evidence artwork that had flowed from members of the public to MSA at Camden Yards, to the law office suite shared by Moag, Modell and the team, and then on to NFLP. JA. 317-20, 394, 400, 704-05, 956-57, 976, 1040, 1577-81, 1587-88.

David Modell contributed creative ideas and provided artistic and managerial direction to the NFLP design team. Modell had overall supervision and control of the logo development process. JA. 348-49, 352, 365, 845, 850, 859-60, 880-81, 1068-69, 1074, 1075, 1076-77, 1080, 1094, 1512-18. On April 8, 1996, a week after Bouchat faxed Moag his Ravens drawings, Modell used the law firm's fax cover sheets for transmission of managerial directives concerning the logo project to NFLP in New York.[5] JA. 1572-76.

As the trial exhibits tellingly demonstrate, Bouchat's and the petitioners' works were strikingly similar. Moreover, they shared common mistakes not found in the public domain or anywhere else. Petitioners' own expert testified that the raven in the respective shield designs did not resemble a real bird, i.e., was fanciful. Both ravens had feet that were the digging claws of a mammal, such as a bear or badger, and contained the very same ornithological errors in proportion, wing shape, notches and number of wing feathers and slots. JA. 1654-60, 1665-66, 1668-75. These mistakes did not have sources within petitioners' research materials. JA. 745-46, 783-84, 1556-57. Some of petitioners' internal work product that was not made public, so that Bouchat could not have had access to it, contained the same mistakes found in the tail feathers of Bouchat's shield design. JA. 1339, 1342, 1343, 1650, 2250. Further, the stylistic typography of the letter B departed from the type used by professional designers in its top-heavy shape. JA. 142-43.

---

[5]The Ravens and the Modell family, along with the other NFL teams and owners, own NFLP and have assigned their interest in their trademarks or logos to NFLP. JA. 355-62, 876.

According to the experts for both sides, Bouchat's drawing and petitioners' logo involve over 20 separate design elements, all of which are virtually identical and are identical in their total selection, coordination and arrangement. The experts for both sides thus concluded that the two works could not have been created independently of each other and, therefore, someone copied. Although petitioners offered their expert testimony in an effort to prove that Bouchat had copied the Ravens' logo, the district court concluded expressly that the jury reasonably inferred that it was petitioners who had copied, given the overwhelming evidence of Bouchat's prior creation and the substantial evidence supporting a reasonable possibility of access. Pet. App. 52a.

## REASONS WHY THE WRIT SHOULD BE DENIED

### A. THE CASE INVOLVES A FACT-DRIVEN APPLICATION OF PROPERLY STATED RULES OF LAW TO THE EVIDENCE

The Petition should be denied because the judgment affirmed in this case was driven by the jury's evaluation of facts and circumstances proved at trial and does not hinge upon a rule or decision of law, much less a question worthy of this Court's attention. Independent of the striking similarity of the two works, evidence supporting a finding of access included the close working and social relationships of the intermediaries during the relevant time period, Bouchat's admitted meeting with Moag, the practice of Moag's office of routing in-coming mail and faxes to Modell and Modell's personal involvement and supervision of the logo design process. Moreover, petitioners' own experts conceded that the two works could not have been created independently of each other. Coupled with the strength of Bouchat's prior creation evidence (which petitioners discount in their petition), this evidence fully supported the jury's finding that there was a reasonable

possibility of access. Succinctly stated, the Petition is an attempt to create a conflict among the Courts of Appeals and with the decisions of this Court on a rule of law, when none exists. What this case really is about is the question whether the district court and the Court of Appeals, both of which reviewed the extensive record in this case,[6] misapplied properly stated and universally accepted rules of law to the evidence in determining whether Bouchat presented sufficient evidence from which a reasonable fact finder could conclude that there was a reasonable possibility of access.

Direct evidence of copying is seldom available to a plaintiff in an infringement controversy. For that reason, the courts of appeals have universally accepted circumstantial evidence to create a **presumption** and a *prima facie* case of copying. To raise this **presumption** and establish a *prima facie* case, a plaintiff must show that (1) plaintiff's and defendants' works were substantially similar, and (2) there was a reasonable possibility that defendants had access to plaintiff's work. *E.g., Gaste v. Kaiserman*, 863 F.2d 1061, 1066 (2nd Cir. 1988)("copiers are rarely caught red-handed"); *Towler v. Sayles*, 76 F.3d 579, 581-82 (4th Cir. 1996); *Ferguson v. National Broadcasting Co., Inc.*, 584 F.2d 111, 113 (5th Cir. 1978); *Selle v. Gibb*, 741 F.2d 896, 900-901 (7th Cir.1984); *Sid & Marty Krofft Television Prods., Inc. v. McDonald's Corp.*, 562 F.2d 1157, 1172 (9th Cir. 1977); *Autoskill, Inc. v. National Educational Support Sys., Inc.*, 994 F.2d 1476, 1490 (10th Cir. 1993). These cases generally stand for the proposition that a reasonable possibility of access means that it was "reasonably possible that the paths of the infringer and the infringed work crossed" or that the infringer had a "reasonable opportunity to view" it. *E.g., Towler*, 76 F.3d at 582. By contrast, "[a] mere possibility that such an opportunity could have arisen will not suffice." *Id.* But once

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[6] Approximately 484 exhibits were admitted into evidence at trial. The Joint Appendix in the Court of Appeals included 3329 pages.

the presumption of copying arises in a plaintiff's favor, it does not vanish upon the defendants' introduction of contradictory evidence and is deemed sufficient to generate a jury question whether defendants copied. *Keeler Brass Co. v. Continental Brass Co.*, 862 F.2d 1063, 1065-66 (4th Cir.1988).

Even under the Fourth Circuit decision in *Towler,* upon which petitioners rely, *see* Pet. at 21-22, a reasonable possibility of access does not require direct evidence of viewing, and it may be proved through circumstantial evidence. *Id.* at 581-83. Moreover, plaintiff need not prove a chain of custody establishing that the infringed-upon work was passed from one person to another in the channel of communication to the actual copier. *Id.* Rather, a "court may infer that the alleged infringer had a reasonable possibility of access if the author sent the copyrighted work to a third party intermediary who has a close relationship with the infringer." *Towler*, at 583. *Towler* instructs that there must be concurrent "contact" between those in the channel through which the work flowed during the same period, and the dealings between the intermediary and the alleged copier must involve some overlap in subject matter to permit an inference of access. *Id.* at 583. Bouchat amply met the requirements set forth in *Towler* with the evidence presented at trial.

Petitioners do not challenge *Towler's* principles here and did not challenge them below. Instead, petitioners argue that the Court of Appeals misapplied its own decision in *Towler*.[7] *See* Petition, at 21-22. In fact, the Court of Appeals applied *Towler* and rejected petitioners' contention that Bouchat's proof was no more than a "tortuous chain of hypothetical transmittals". The Court, relying on *Towler* and consistent with the Second Circuit decision in *Gaste,* 863 F.2d

[7]Petitioners also contend that the decision is in conflict with this Court's description of the law governing reasonable inferences set forth in a personal injury case involving a train accident. *See* Petition, at 19, citing *Pennsylvania Railroad Co. v. Chamberlain*, 288 U.S. 333, 340-41 (1933).

at 1066 and the Seventh Circuit decision in *Selle*, 741 F.2d at 900-901, rejected "mere 'speculative reasoning' as a basis for proving access, especially when intermediaries are involved." *See* Pet. App.5a. The Court found sufficient facts in the record independent of striking similarity to support the jury's inference of a reasonable possibility of access based on the concurrent, close relationships and a channel of communication linking the intermediaries and the alleged copiers. *See* Pet. App. 4a-7a. The district court judge who presided over the lengthy trial reached the same conclusion. Pet. App. 46a-48a. By contrast, the dissent below, upon which petitioners rely heavily, urged that the majority had misapplied *Towler* to the facts of this case. *See* Pet. App. 12a-14a ("I simply cannot agree with the majority's conclusion that this evidentiary record establishes that the defendants copied Bouchat's shield drawing."). This dispute over the sufficiency of the evidence does not raise a question of law, compelling this Court's attention. Further, the policy concerns raised in the Petition are not present in this case at all because Bouchat produced substantial and credible evidence that he created his Ravens shield drawing well prior to the selection of the team's name, and well in advance of the petitioners' design process.[8]

## B. PETITIONERS' EVIDENCE WAS CONTRADICTED, IMPEACHED AND REJECTED BY THE JURY

The Petition is based on the testimony of interested witnesses for the defense and a misleading argument that their testimony was direct, uncontradicted and unimpeached. The argument is squarely at odds with the presumption of copying created in Bouchat's favor that petitioners do not challenge. Petitioners' witnesses, however, were impeached and

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[8]Bouchat's prior creation witnesses went uncontradicted during the trial; and they are not mentioned in the Petition.

contradicted; and the record reflects that petitioners' witnesses do not support petitioners' bald denial of access. *See Reeves v. Sanderson Plumbing Prod.*, 530 U.S. 133, 149-51 (2000)(a "court should give credence to the evidence favoring the nonmovant as well as that 'evidence supporting the moving party that is uncontradicted and unimpeached, at least to the extent that that evidence comes from disinterested witnesses.'"), *quoting* 9A C. Wright & A. Miller, Federal Practice and Procedure § 2529, p. 299 (2d ed. 1995). Petitioners did not base any Rule 50(a) motion on the testimony of their own witnesses, and simply have not preserved the contention they urge upon this Court.

Petitioners were unable to establish independent creation of their work. Petitioners' design appeared from out of nowhere less than two weeks after Bouchat's fax was sent to Moag. Petitioners' designers, who were working under extreme time pressures, had no preliminary design work that resembled the shield design prior to Bouchat's fax, without, as the district court observed, "a good deal of literary license." Pet. App. 52a & n.24. Kim, the project's head designer, acknowledged at trial that on approximately 77 occasions during her deposition, she was unable to answer questions concerning the dates, times and sequences of design development or to explain the source of "her" design. Osaki, another NFLP designer, was similarly impeached. JA. 630-39, 644-703, 746-69. The jury reasonably could have concluded, therefore, that Kim and Osaki had no independent recollection concerning the chronology of their work product and that their testimony at trial was based on computer files that Bouchat established were not trustworthy and contained suspicious irregularities and discrepancies concerning dates and times of last modification. JA. 1096-1128, 1133-44, 1151-52.

Both Kim and Osaki acknowledged that they photocopied bird books from a public library, scanned them into NFLP computers and incorporated the same images into

commercial presentations made to David Modell for the logo project. Paula Guibault, NFLP in-house counsel, testified that such activity would violate the NFLP insulation policy. Bruce Burke, NFLP's creative director, testified that it would cause him "lots of concern" if NFLP designers scanned silhouettes from published works in a public library into their computers and then incorporated them into presentations made to David Modell. Clearly, however, this is what the NFLP designers did. JA. 1547-50, 1596-97, 1600-02, 1606-09, 1612, 1620-22, 1632, 1637, 1639, 1725-1747A.

Petitioners point to various individuals who testified for the defense that they did not see Bouchat's drawing. But petitioners did not present such testimony from all the persons in the channel of communication or from those persons whose jobs necessarily would have involved the handling of the fax, such as, for instance, the receptionist at the law firm. Moag testified that he did not recall seeing it. Pet. App. 76a, 78a. On cross-examination, he also conceded and displayed that he had a poor recollection of the events. JA. 966, 968-69, 975-76. Moag testified that he did pass on design submissions to Modell for political reasons, which was why the meeting with Bouchat took place. Pet. App. 76a. Petitioners point to the testimony of Beth Henry, Moag's secretary, who stated that outside submissions were placed in a separate folder, and that Bouchat's drawings were not contained in that folder. An examination of the file to which Henry made reference, however, reflects that there were only three drawings in the entire file, not the numerous submissions of artwork from the public that Moag testified he had received. Moreover, if Bouchat's drawings had been passed on, they would not have remained in Moag's file.

Petitioners also point to David Cope's testimony to support the proposition that no artwork was forwarded to NFLP after April 1, 1996. While testifying that he had certain supervisory duties related to the intake of submissions from the public, Cope testified that he was not involved in the routine,

day-to-day handling of the vast number of submissions from the public. He also testified that he did not begin his full-time duties with the Ravens until approximately March 18, 1996 and he had no involvement with submissions of artwork when he first began his duties. Cope testified that the team did not start sending back submissions from the public until April 4, 1996, a few days after Bouchat faxed his works to Moag on April 1 or 2, 1996. JA. 1036-38.

Petitioners argue that MSA conducted a search of its files, which revealed that Bouchat's fax never was received and forwarded to the team. There was no evidence, however, that MSA kept or had any reason to keep a copy of any of the many submissions of artwork that it received from members of the public. Nor would MSA personnel have any reason to recall a particular submission given the volume of submissions that it received.

Petitioners point to the testimony of Paula Guibault for the proposition that it was NFLP's policy that its creative people were not to look at unsolicited submissions from the public. Guibault, who became an NFLP employee in February 1996, testified that she memorialized this policy in a March 11, 1996 memorandum, which was circulated to NFLP executives. While she testified in general terms that this policy was made known to some corporate executive officers, there was no testimony that the policy was implemented or enforced. There was no testimony that Kim or Osaki were familiar with this policy, or that they followed it. There was no testimony that the policy was given or explained to the designers or what steps were taken to ensure that its terms were followed. Guibault, significantly, did not testify how, in fact, the drawings received from the public were processed. Guibault was unaware of the practices followed by NFLP designers, including their copying of drawings from copyrighted bird books, and did not testify that she conducted any audit or inspection of their practices in general, nor did she search for Bouchat's work. JA. 1045-53,

1055-57. Contrary to this policy memorandum, David Modell wrote letters to members of the public from whom he received artwork, stating that he would pass it on to NFLP. JA. 1581, 1588. This evidence suggested that no policy of insulation was established or followed by NFLP. Cope's testimony that Ravens personnel looked at submissions from the public was evidence that the insulation policy was not being followed. JA. 1043-44, 1916.

The denials of access by Kim, Osaki, Burke and David Modell at trial were so similar in content and theatrical in attitude that the jury reasonably could draw the conclusion that their testimony was rehearsed and staged, particularly given testimony that their "witness coach" and jury consultant was present in the courtroom throughout the trial. The emotions of petitioners' witnesses appeared to be turned on and off as if on cue. Their finger-pointing denigration of Bouchat also gave the impression of a rehearsed performance rather than truthful testimony. When combined with documentary evidence of the existence of a "party line" in the Ravens' dealings with the outside world in similar situations, it was reasonable for the jury to have an unfavorable view of the credibility of these witnesses. JA. 704-07, 770, 865-69, 926-27, 1081-83, 1518.

## C. THE PETITION CONTAINS NUMEROUS MISSTATEMENTS OF THE RECORD

The Petition contains misstatements of the record and proceedings below. Petitioners ignore virtually all of Bouchat's evidence and the reasonable inferences that must be drawn in his favor. *See Reeves*, 530 U.S. at 149. Instead, petitioners select snippets of the evidence and twist them to their favor. For instance, the Petition is premised on a factual theory that Bouchat created the Garrett drawing (Pet App. 67a), an unregistered work, in December 1995, and then modified it

after he saw the Ravens logo in June 1996.[9] Petition, at 7, 9-10. Petitioners' factual hypothesis concerning the Garrett drawing was not advanced at trial and first appeared in this case in petitioners' brief in the Court of Appeals. The Garrett drawing was part of Bouchat's work-in-progress that he presented at trial, and petitioners never challenged it as such. Petitioners' arguments concerning the Garrett drawing, coupled with the depiction of the various works in the body of the Petition, at 7-9, taken out of their chronological sequence, are misleading. The evidence at trial clearly established that Bouchat created the Garrett drawing (Pet. App. 67a) AND afterwards the exact shield design at issue (Pet. App. 69a) on or before December 5, 1995, before the petitioners' design process even began in late March 1996. It was also established that Bouchat sent his shield design to the MSA at the earliest stages of the NFLP design process, on April 1st or 2nd, well before Bouchat could have had access to petitioners' logo. Pet. App. 41a, 52a.

Petitioners depict a November 1995 sketch of a helmet by Bouchat and incorrectly state that Bouchat presented this drawing to Moag on March 28, 1996. *See* Petition, at 12. In fact, Bouchat presented Moag an actual miniature helmet with a finished Ravens' decal design, albeit similar to the preliminary drawing (Pet. App. 71a) that Bouchat created in November 1995. The State Information Officer photographed Bouchat and Moag with the helmet in Moag's office. Pet. App. 76a-78a. Similarly, petitioners' characterizations of Bouchat's

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[9]Petitioners incorrectly state that Bouchat claimed that the so-called Garrett drawing (Pet. App. 67a) was the first drawing that bore similarity to the shield drawing. It was part of Bouchat's work-in-progress leading up to his finished work. Pet. App. 69a. It was not the beginning or the end of the progression of drawings leading up to Bouchat's final shield drawing. In early December, Bouchat gave Lena Garrett, a secretary in the building, this drawing. Garrett testified that she also saw Bouchat's finished shield drawing around this same time. JA. 768-69.

artistic skills and background are not only uncharitable, but they are inaccurate.

Petitioners state that the district court noted that the wings on the Bouchat "shield drawing" reflected a much higher level of artistic skill. *See* Petition, at 9. The district court, however, was clearly referring to the wings on the "bird drawing," another drawing in the case, and specifically used that term, not the term "shield drawing." Pet. App. 73a. The district court carefully distinguished the term "bird drawing" from the term "shield drawing," the one at issue on this appeal. Pet. App. 39a & n.5. Petitioners also state that the jury found against Bouchat on the issue of access on two of the three drawings. This is a misstatement. The special interrogatories posed to the jury asked whether Bouchat proved by a preponderance of evidence that he created in 1995 the same exact drawing as was attached to his copyright application and whether he had proven that he had faxed the same exact drawing attached to his copyright application. It was only with respect to the shield drawing that the jury answered in the affirmative. Pet. App. 49a-51a.

Petitioners state that Bouchat's expert, Anders, testified that there was an identifiable process and development of Ravens logos by the NFLP designers. Anders, however, actually testified that Kim's preliminary sketches had nothing to do with the designs in issue. Anders testified that the NFLP design work product did not reflect a developmental process and contained significant gaps.[10] JA. 154-55, 169, 174-75.

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[10]On cross-examination during *voir dire*, Anders testified that certain Asian countries consider it a sign of respect to copy. Petitioners now appear to claim prejudice from this testimony. *See* Petition, at 15n2. Yet petitioners' counsel did not request a mistrial, and they continued to come back to Anders' comment throughout the trial as part of their trial strategy, including incessant cross-examination after Anders' testimony in chief, in an unfair attempt to portray Anders as a racist.

Petitioners' own expert, Ziegler, testified that it was impossible to determine from petitioners' work product the sequence and chronology of their work. JA. 1000-01.

## D. THE ISSUE OF STRIKING SIMILARITY IS NOT FAIRLY PRESENTED BY THIS CASE

The district court did not instruct the jury on striking similarity, and the question certified to the Court of Appeals concerning striking similarity was posed in the alternative in the context of the basic issue dealing with sufficiency of the evidence. Pet. App. 61a. Petitioners did not request an instruction on striking similarity and did not object to any argument to the jury based on the similarity of the works. The Court of Appeals found that Bouchat had established a reasonable possibility of access, independent of the degree of similarity of the two works. Pet. App. 8a-9a. As a result, that portion of the decision addressing the doctrine of striking similarity (Pet. App. 8a-9a) was not essential to the judgment of affirmance, and would not result in reversal.[11]

## E. PETITIONERS DID NOT OBJECT TO THE JURY INSTRUCTION THEY NOW ASSERT WAS COERCIVE

Petitioners claim error from a coercive jury instruction, a small portion of a so-called "Allen" charge, but petitioners' counsel did not object to the instruction before the jury retired. Pet. App. 89a-90a, 93a, 95a. It is obvious that this argument

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[11]The dissent, given the majority's decision on the first certified question and the interlocutory nature of the appeal, was of the view that the Court should not have answered the striking similarity question, as it was conditioned on there being insufficient independent evidence of a "reasonable possibility of access." Pet. App. 25a, 61a.

poses no significant issue warranting this Court's attention; in any event, it was not preserved for appellate review. *See* Fed.R.Civ.P. 51.

## CONCLUSION

The Court of Appeals, and the district court, determined that the evidence presented at trial generated a jury question on whether Bouchat proved "reasonable possibility of access." After summarizing that evidence, the Court of Appeals concluded, "there is evidence counter to the above, but such a conflict in evidence presents the classic jury issue, and the jury's resolution of that issue was for the plaintiff." Pet. App. 7a & n. AI. This case presents no fundamental questions of copyright law, or any conflict among the Courts of Appeals. The Petition should be denied, and the case returned to the district court for a trial on damages.

Respectfully Submitted,

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**PLAINTIFF'S TRIAL EXHIBIT 1**
(Admitted October 7, 1998)



(3)

No. 00-1494

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IN THE

# Supreme Court of the United States

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BALTIMORE RAVENS, INCORPORATED AND
NATIONAL FOOTBALL LEAGUE PROPERTIES, INCORPORATED,
*Petitioners*,

v.

FREDERICK E. BOUCHAT,
*Respondent*.

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**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit**

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## PETITIONERS' REPLY MEMORANDUM

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## ARGUMENT

### I. THE QUESTIONS PRESENTED ARE LEGAL IN NATURE AND GOVERN LIMITATIONS ON INFERENTIAL PROOF THAT CAN SUBSTITUTE FOR EVIDENCE OF ACCESS IN COPYRIGHT CASES

Despite Respondent's attempts to characterize the questions presented by the Fourth Circuit's majority decision as purely factual, the trial court's legal standard of factual sufficiency effectively abandoned the requirement of access. Respondent would ask this Court to turn a blind eye to the Fourth Circuit split panel's implicit and explicit elimination of the access element needed to prove copying. This construction of copyright law contravenes prior decisions of this Court and other courts of appeal.

The instant petition focuses on the access requirement of copyright law and whether it is legally appropriate to relax a copyright plaintiff's burden of proof by permitting a string of tenuous inferences to substitute for concrete evidence of access. This critical issue involves not only copyright jurisprudence, but extends as well to all civil trials. There is no clearer case for Supreme Court review.

A plaintiff's proof of access in a copyright infringement case itself constitutes inferential proof of copying—circumstantial, not direct, evidence that copying occurred. *Towler* v. *Sayles*, 76 F.3d 579, 581-82 (4th Cir. 1996). In assessing the evidence of access here and the district court's performance of its role as gatekeeper, the Fourth Circuit panel majority permitted the jury to entertain a speculative series of additional inferences.[1] (*See* Pet. App. 22a, 24a (King, C.J., dissenting).)

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[1] To find access by Petitioners to Respondent's drawing, the jury of necessity relied on a string of unsupported, contradicted inferences and from there presumed copying, once again by inferential extension.

Notwithstanding Respondent's claims to the contrary, (Resp. Br. at 9-16), the record before the Fourth Circuit contained the unimpeached, uncontradicted testimony of no access by Petitioners, as recognized by Circuit Judge King in his vigorous dissent. (Pet. App. 16a - 22a (King, C.J., dissenting).) The Court of Appeals panel majority never questioned or disputed the evidence demonstrating lack of access. Instead, as Respondent acknowledges, (Resp. Br. at 7), the Fourth Circuit reached its split decision in the face of that evidence. In an attempt to color as fact-based the review requested herein, Respondent mischaracterizes the record below by referring to "the jury's evaluation of facts and circumstances *proved* at trial." (*See* Resp. Br. at 6 (emphasis added).) There was no such proof.

Instead, the string of inferences that culminated in the ultimate inference of copying amounted to a mere gossamer thread: Respondent offered no proof, but only supposition as to what could have happened. If such supposition is accepted as proof, then copyright law's access requirement serves no meaningful function.

## II. SHIFTING THE BURDEN OF PROVING ACCESS FROM PLAINTIFF TO DEFENDANT CONSTITUTES AN IMPERMISSIBLE END RUN AROUND ESTABLISHED PRINCIPLES OF COPYRIGHT LAW

The Court of Appeals panel majority, like the district court before it, purposely chose to discount Petitioners' evidence refuting access, (*see* Pet. App. 7a AI), in favor of layers of inferential proof that impermissibly operate to reallocate the burden of proof. While Respondent takes pains to note that the presumption of copying remains even after a copyright defendant's introduction of contrary evidence, (Resp. Br. at 8 (citing *Keeler Brass Co.* v. *Continental Brass Co.*, 862 F.2d 1063, 1065-66 (4th Cir. 1988))), Respondent fails to

acknowledge the significant, related holding that the ultimate burden of persuasion remains constant—and rests, always, with the plaintiff. *Keeler Brass*, 862 F.2d at 1066.

Respondent can not satisfy his burden of persuasion merely by argument against Petitioners' proof. He must provide affirmative evidence, which he has never done. Self-evidently, the implicit assumption of both Respondent and the Fourth Circuit panel majority that the jury's freedom to disregard Petitioners' denials of access can alone satisfy Respondent's heavy burden is erroneous, for if it does, then all cases will survive summary judgment. Mere credibility attacks,[2] without more, do not amount to *affirmative evidence* and do not carry sufficient legal weight to satisfy Respondent's burden of proving access. *See Bose Corp.* v. *Consumers Union of United States*, 466 U.S. 485, 512 (1984).

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[2] Respondent's Brief, like the case he presented at trial, consists of *nothing but* credibility attacks. However, (1) Respondent's questioning of the relationship between John Moag ("Moag") and David Modell ("Modell"), (Resp. Br. at 6), is immaterial, as their relationship did not—as it must, *see Towler*, 76 F.3d at 585—concern the matter at issue, logo development; (2) Respondent's persistent attempts to undercut the validity of Petitioners' independent creation, (Resp. Br. at 10-11), was addressed at trial, when the court specifically instructed the jury not to credit any suggestion that improper liberties had been taken by the design team; (3) despite Respondent's strained endeavor to link Moag and Modell, together, to Bouchat, (Resp. Br. at 11), Moag never forwarded design submissions to Modell "for political reasons" or otherwise, and the evidence plainly established that the brief photo session with Moag and Bouchat was conducted as a favor to Bouchat's employer, the Maryland Department of Labor, Licensing and Regulation, *not* Modell; (4) Respondent confuses his dates, (Resp. Br. at 12), in that David Cope implemented the Ravens' corporate policy of returning public submissions and not forwarding them to New York on March 18, 1996, whereas the first wave of cover letters accompanying the returned submissions was sent a few weeks later, on April 4, 1996; and (5) Respondent's dramatic characterizations of Petitioners' witnesses' testimony are but fanciful embellishments, illustrative of Respondent's desperate attempts to substitute credibility accusations for hard evidence.

Respondent's alleged prior creation of his drawing or the application of the "striking" similarity doctrine[3] to the proof of access cannot function as a burden-shifting device. They are not—and should not be transformed into—substitutes for the established legal requirement of access. First, a copyright plaintiff's prior creation[4] has absolutely no bearing on the critical, material question of what proof suffices to show access and thereby establish copying. Second, Circuit Judge King pointed out in dissent that the Fourth Circuit panel majority *implicitly* reduced the evidentiary showing necessary to demonstrate access, by endorsing extreme inferential proof in contravention of decisions of this Court and other courts of appeal. (*See* Pet. App. 16a & n.3 (King, C.J., dissenting).)

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[3] Respondent's suggestion, (Resp. Br. at 16), that Petitioners should be precluded from challenging the striking similarity doctrine is misplaced. During the charging conference, Petitioners objected to any jury instruction on striking similarity, precisely because it is a doctrine that should not have had *any* part in the trial at all. Similarly, Respondent's suggestion that Petitioners did not properly object to the coercive jury instructions at issue, (Resp. Br. at 16), is inaccurate: Petitioners voiced their objections to each of the coercive supplemental charges at the earliest available opportunity.

[4] Respondent erroneously claims that Petitioners made no mention of the witnesses who testified at trial as to Respondent's prior creation of his drawing. (Resp. Br. at 7 n.8.) Although irrelevant to the Petition on the basic issues and accordingly not necessary for Petitioners even to attempt to disprove, Petitioners nonetheless did address, and discount, Respondent's claimed evidence. (Pet. at 10.) What *Respondent* not surprisingly fails to mention in his drawing-as-Christmas-gift discussion, (Resp. Br. at 2-3), is that the witness in question had previously been convicted of a felony for fraudulent conduct, committed while a government employee. While there *were* witnesses who, testifying several years later, believed they could place some of Bouchat's many Ravens works prior to June, 1996, eyewitness testimony of this kind is considered inherently suspect for good reason. The Christmas-time tale spun by Respondent is but another illustration of the lengths to which Respondent's pattern of fabrication can run, if left unchecked. It highlights the importance of the judicial role as gatekeeper, shielding juries from like frivolous claims.

Third, the panel majority decision would likewise *explicitly* eliminate the access requirement *entirely* by application of the "striking" similarity standard. This questionable legal authority is the subject of vigorous debate among various courts of appeal, (*see* Pet. at 23-24), which should be resolved by this Court.

Adopting the much-debated doctrine of "striking" similarity, (*see* Pet. at 23-24), as well as crediting as relevant Respondent's "evidence" of prior creation, effectively shifts the burden of proving copying from the plaintiff to the defendant. No authority exists for so drastically upending copyright law.

## III. SHIFTING THE BURDEN OF DISPROVING INDEPENDENT CREATION FROM PLAINTIFF TO DEFENDANT CONSTITUTES AN ABANDONMENT OF TRADITIONAL COPYRIGHT JURISPRUDENCE

Likewise, by the mere use of the label "striking" similarity, the split panel decision contravened established principles of copyright law by impermissibly reallocating the burden of proof as to independent creation. The burden always rests on Respondent, as the copyright holder, to show that there was no independent creation. *Keeler Brass*, 862 F.2d at 1066. In sum, Respondent's submission does not—and can not—meet the challenge to the defects in the Fourth Circuit panel majority's application of copyright law.

## CONCLUSION

This case presents compelling legal questions regarding a conflict among the circuits over the standards to be applied in copyright cases, the use of unsupported inferences in all trials, and the impermissible shifting of the burden of proof on fundamental copyright issues. For the reasons set forth in the Petition and in this Reply Memorandum, the petition for a writ of certiorari should be granted.

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Dated: April 30, 2001

(4)

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# Supreme Court of the United States

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v.

FREDERICK E. BOUCHAT,

*Respondent.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit**

## BRIEF BY AMICI CURIAE MOTION PICTURE ASSOCIATION OF AMERICA, INC., RECORDING INDUSTRY ASSOCIATION OF AMERICA, INC. AND AMERICAN FILM MARKETING ASSOCIATION IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI


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## STATEMENT PURSUANT TO RULE 29.6

None of the amici associations has issued shares to the public.

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## I. INTRODUCTION

The Motion Picture Association of America, Inc. (MPAA), the Recording Industry Association of America, Inc. (RIAA) and the American Film Marketing Association (AFMA) ("amici")[1] support the petition for a writ of certiorari to review the October 3, 2000 split decision by a panel of the United States Court of Appeals for the Fourth Circuit, as amended December 28, 2000 (reproduced in the petitioner's Appendix A at 1a-28a) and reported, as corrected, at 241 F. 3d 35 (4th Cir. 2001).*

This case raises important questions concerning the proper gatekeeping role of courts in setting benchmarks for what constitutes substantial evidence of "actual copying" in a copyright infringement case – a requirement that "has, surprisingly, resulted in considerable confusion."[2] The decision below conflicts with decisions of this Court and other circuits, by effectively abandoning any legal standard of proof to infer "access" and by allowing juries to use unsupported inferences to prove copying in the face of uncontradicted evidence to the contrary.

In *Mazer v. Stein*, 347 U.S. 201, 218 (1954), this Court held that despite any similarities, "absent copying, there can be no infringement." Now, this Court is called upon to determine whether alleged *similarity* alone may prove the act of copying. By adopting a "controversial method"[3] to prove copying by a "striking similarity" doctrine

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* All parties have given their written consents to the filing of this Brief, which consents will be filed with the Court.

[1] As required by Sup. Ct. R. 37.6, *amici* represent that none other than the *amici* have made a monetary contribution to the preparation or submission of this brief, and no counsel for any party has authored any part of this brief.

[2] 1 W. Patry, *Copyright Law and Practice* at 690 (1994) (*"Patry"*).

[3] 1 *Patry*, at 700.

which is a disguised example of "bad science," the decision below would allow liability to be imposed without substantial evidence of access and copying. Such a result would work a "radical upheaval in all of copyright doctrine"[4] – transforming copyright law into patent law, where a defendant must prove its work is "novel" to obtain protection and avoid liability.

Because there are so many reasons other than copying why two works might be similar,[5] copyright law cannot fulfill its mission to " . . . promote the Progress of Science and useful Arts . . . " U.S. Const., art. I, § 8, cl. 8, unless lower courts are given clear direction as to what evidence is required to satisfy the threshold showing of access and actual copying. The decision below subverts the rights of authors to be free from specious claims of infringement based upon nothing more than similarity and speculation about access.

In particular, the Fourth Circuit's affirmance of the jury verdict poses a risk to the multi-billion dollar copyright industries in this country by essentially holding that individuals and companies have no means to avoid an inference of "access" or "actual copying" by insulating creative personnel from unsolicited submissions. The evidence below was undisputed that petitioner NFLP had a written policy of isolating its designers from receipt of unsolicited submissions and that the alleged provider of the copyrighted work to NFLP – the petitioner Ravens – similarly had a policy that all outside submissions of created work were to be returned to the sender. Further,

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[4] 1 M. & D. Nimmer, *Nimmer On Copyright* § 2.01 at 2-8 to -9 (2000).

[5] Alexander Lindey, *Plagiarism and Originality* (1952) at 25 (listing 15 reasons such as the use by each work of the same or similar theme, that common themes carry common accessories, the use of stereotypes, the use of hackneyed ingredients, the imperatives of convention, use of common source material, and the existence of conventions.

the testimony was uncontroverted that the alleged provider of the plaintiff's work to the Ravens – attorney Moag – had a policy that no outside submissions should ever be forwarded to the Ravens. All hypothetical recipients of the submission denied receipt, and no contrary evidence of receipt existed. If the undisputed existence of these policies at three points in the alleged chain of "access" and denials of receipt does not prevent treating contrary "inferences" as substantial evidence of access and copying, then the artists and companies which institute and follow such policies will nevertheless be subjected to an increased number of baseless claims.

The decision below[6] holds that proof of access by a Company (A) having contacts with a law firm (B), which is in the same building as defendant corporation (C) in Maryland proves that creators (D) working in the New York office of defendant corporation (E) had access to plaintiff's work. In the context of the motion picture and recording industries, such a rule of inferences – in the face of contrary direct denials and firewall practices that contradict the inferences – would effectively eliminate the requirement of access, and functionally change the applicable legal doctrine from "copyright" to "similarity right." This would fundamentally transform copyright

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[6] Although Respondent's Opposition Brief, at 1-6, asserts a number of evidentiary facts not disclosed or relied upon by the Fourth Circuit's decision, it is of course the Fourth Circuit's express rationale that will have the adverse effect about which *amici* are concerned. Published opinions about the minimum evidence necessary to raise an inference of "access" set benchmarks that impact motions for summary judgment, for directed verdict, for judgment as a matter of law and appellate review. *See* E. Volokh & B. McDonnell "Freedom of Speech and Independent Judgment Review in Copyright Cases", 107 *Yale L. J.* 2431 at 2455-60 (1998).

law (which only prohibits copying) into the law of patents (which prohibits equivalent matter, irrespective of independent creation). See note 4, *supra*.

It is not surprising that commercially successful songs, recordings, movies and television series attract copyright infringement claims. The substantial remedies of the Copyright Act[7] – damages, disgorgement of profits, injunctive relief, destruction and attorneys fees – offer a powerful incentive for suits. Nor should it be surprising that the threat of protracted litigation[8] and large jury verdicts can serve to chill investment of creative efforts and money.

Songs, motion pictures, television programs and books are "speech" entitled to First Amendment protections. *See Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 578 (1977) ("there is no doubt that entertainment, as well as news, enjoys First Amendment protection").[9] In areas other than copyright, such as defamation law, where tort law liability rules put speech at risk, the Courts have fashioned special substantive and procedural rules: burdens of proof are shifted, substantive rules are changed to expand the risk-free sphere of speech, summary adjudication is encouraged, and verdicts are subjected to independent review on appeal. *See Bose Corp. v. Consumers Union*, 466 U.S. 485, 502-511 (1984); E. Volokh & B. McDonnell, "Freedom of Speech and Independent

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[7] Copyright Act of 1976, as amended, §§ 502-05; 17 U.S.C. §§ 502-05.

[8] On June 3, 1999, respondent commenced a companion case against more that 400 defendants – some of them members of *amici* – who are alleged somehow to have used the same logo in sales, broadcasts, displays, etc. *Bouchat v. Champion Prods.*, Dkt. No. MJG-99-1576 (D. Md. 1999).

[9] *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501 (1952) (books, newspapers, magazines and movies are forms of expression that do not lose their First Amendment protections because they are sold for profit).

Judgment Review in Copyright Cases," 107 *Yale L.J.* 2431, 2439-41 (1998) ("*Volokh*" hereafter).

Courts have evolved some rules to accommodate free speech interests with copyright law.[10] Thus, the circuit courts have generally agreed that meritless claims could be dismissed as a matter of law where plaintiff failed to show (1) that the subject works were substantially the same in their protectible expression, or (2) that any actionable similarities arose from actual copying. A plaintiff might attempt to prove the latter element, "actual copying," by circumstantial[11] evidence that similarities existed that indicated copying ("probative similarity")[12] and that the creator of defendant's work had a reasonable opportunity to read or hear plaintiff's work ("access") by reason of wide public dissemination or through intermediaries. *See* 3 M. & D. Nimmer, *Nimmer On Copyright*, § 12.10[B][2] & [3] (2000) ("*Nimmer*"). In that case, a lack of "access" would be fatal to the claim.

The decision below threatens to undermine those salutary rules and the nationwide benchmarks adduced by the caselaw regarding the sufficiency of evidence. Although the Fourth Circuit purported to render a narrow, fact-specific decision (App. A at 5a-7a), it also conceded that it was deciding a legal issue: whether the

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[10] *See* Volokh, 107 *Yale L.J.* at 2439-41.

[11] Although courts routinely state that direct evidence is rarely available, at least one commentator disagrees. A. Latman, "Probative Similarity As Proof of Copying: Toward Dispelling Some Myths In Copyright Infringement", 90 *Colum. L. Rev.* 1187, at 1214 (1990).

[12] For years, courts used the term "substantial similarity" to refer to similarities that indicated both (1) unlawful copying and (2) actual copying. The term "probative similarity" is now the preferred term to analyze the "actual copying" inquiry. 4 *Nimmer*, § 13.01[B] at 12-12; 2 P. Goldstein, *Copyright* § 7.2.1.2 at 7:12 & n. 16 (2d ed. 2000) ("*Goldstein*"); 1 W. Patry, *Copyright Law and Practice* 692 & n. 779 (1994) ("*Patry*").

inferences of access and copying may arise in the face of undisputed direct evidence to the contrary. *Id.* It thus lowered or obliterated the threshold for access and thereby exposed authors' reputations and incomes to unreviewable decisions by juries allowed to speculate about access and copying.

The stakes in assuring the courts' roles as gatekeepers are high. The decision below can have significant economic consequences. For example, sound recordings comprise a $12.5 billion domestic industry, and the foreign sales of U.S. recorded music amount to more than $12 billion, representing approximately sixty percent of the world's consumption of music. Similarly, motion pictures, through theatrical, television and home video exploitation comprise a $32 billion domestic industry, and the foreign sales of U.S. produced motion pictures amount to more than $14 billion, annually.

The composers, authors and other creative artists whose works form the backbone for these burgeoning segments of the economy should not be made to labor under the chilling effect created by standard-free findings of "access" that allow juries to assume the creators of new works have unlawfully "copied" materials, which they never heard or saw.

Such a lax "standard" stands in stark contrast to such copyright policies as, for example, those underlying section 101 which requires a writing to confirm certain work-for-hire situations, and section 204(a) which requires writings to validate transfers of copyright – because of the paramount interest in making ownership of copyright clear and definite to make such property readily marketable.[13] The special evidentiary requirements to protect authors of inadvertent transfers seem

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[13] *Eden Toys, Inc. v. Florelee Undergarment Co.*, 697 F. 2d 27, 36 (2d Cir. 1982) (§ 204a); *Schiller & Schmidt, Inc. v. Nordisco Corp.*, 969 F. 2d 410, 412 (7th Cir. 1992) (§ 101); *Kongisberg Intl., Inc. v. Rice*, 16 F. 3d 355, 357 (9th Cir. 1994) (§ 204a).

hollow if jurors can, on a hunch, "transfer" a defendant author's copyright rights to a stranger who only claims to have faxed a submission to an office of a company that is related to another firm that is in the same building as a company which is affiliated to the author's employer in a distant city.[14]

The adverse ramifications of the decision below are substantial, national in scope, harmful to the creative process and chilling to the speech interests of creative artists and their distributors. By deferring to the jury's unbounded speculation about "access," the decision may deter district courts from ruling as a matter of law that meritless claims rest on mere conjecture. An additional rule that would permit a jury to infer access from unprincipled "expert" opinions as to whether similarities compel an inference of actual copying would eliminate "copying" as an element of a copyright claim. Forum-shopping will be encouraged.[15] The Fourth Circuit thus directly contradicts this Court's admonition that "it is peculiarly important that the boundaries of copyright law be demarcated as clearly as possible." *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 526 (1994).

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[14] The recent play and film entitled "Six Degrees of Separation" were based on the conceit that everyone is separated from everyone else in the world by only six acquaintances. The Fourth Circuit's decision would allow a jury to reduce the number to four and to infer all necessary contacts.

[15] Although the conflict in the circuits created by the Fourth Circuit's decision itself merits review, this Court has granted review on important copyright issues even in the absence of such conflicts. *E.g.*, *New York Times Co. v. Tasini*, Dkt. No. 00-201, *cert. granted*, 69 U.S.L.W. 3316 (11/6/2000) (where recent circuit decision threatens to disrupt settled publishing practices); *Mills Music v. Snyder*, 469 U.S. 153 (1984) (holding that publisher was entitled to share in royalties from derivative works under terms of grant from author; petitioner alleged no conflict in the circuits).

## II. INTERESTS OF THE AMICI

The Motion Picture Association of America, Inc. ("MPAA"), is a not-for-profit corporation founded in 1922 as the trade association of the American film industry. MPAA promotes the interests of the motion picture industry in the United States by seeking to protect the rights of copyright owners; serving as the advocate for the major producers and distributors of motion pictures, television programs and home video; directing an anti-piracy program to protect U.S. films, television programming and home video throughout the United States; and helping the industry maintain high standards and public goodwill. MPAA represents seven of the largest producers and distributors of filmed entertainment for theatrical, television and home video distribution.[16] MPAA members distribute motion pictures in some eighty countries throughout the world and have been prime beneficiaries of the protections afforded by copyright.

The Recording Industry Association of America ("RIAA") is a trade association representing more than 300 recording companies, including BMG Entertainment, EMI Recorded Music, Sony Music Entertainment, Inc., Warner Music Group, and Universal Music Group. Members of the RIAA manufacture, produce, and/or distribute approximately 90 percent of all legitimate sound recordings in the United States and own the copyrights in those works. One of the RIAA's principal objectives is to support and promote the creative, artistic, free speech, and financial interests of recording artists and the RIAA's member companies. Because piracy of copyrighted works costs artists, producers, songwriters, and others in the

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[16] The members of the MPAA are Universal Studios, Inc., Paramount Pictures Corporation, Sony Pictures Entertainment, Inc., The Walt Disney Co., Warner Bros., Twentieth Century Fox Film Corp., and Metro-Goldwyn-Mayer, Inc.

recording industry hundreds of millions of dollars annually, the RIAA considers the prevention of illegal copying and distribution of copyrighted sound recordings to be one of its most important tasks.

AFMA is a trade association representing over 150 independent producers and distributors of motion pictures and television programming as well as 27 affiliated financial institutions that provide funding for independent production. AFMA members include: NBC Enterprises, HBO Enterprises, USA Films, Viacom Pictures/ Showtime Networks, Miramax International, Saban Pictures International, New Line Cinema, RKO Pictures, Shooting Gallery, and United Artists Films Limited.

Many members of the amici are authors.[17] 17 U.S.C. § 201(a) & (b). As producers and distributors, they are also frequent targets of infringement claims and suits involving unsolicited submissions[18] to persons not involved in the creative process. Creative and financial investments are immediately threatened by the decision below that indulges fictions of "corporate receipt", inferences of access in the face of denials of receipt, and the

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[17] In *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 524, 526 (1994) this Court reminded that defendants in copyright infringement cases are often themselves copyright owners, and that "the policies served by the Copyright Act are more complex, more measured, than simply maximizing the number of meritorious suits for copyright infringement."

[18] As standards of proof decline, litigation is encouraged. In Los Angeles County alone, in 1999, over 100 lawsuits were reportedly filed claiming infringement. See G. Moran, "Tears in Tinseltown," *California Lawyer*, p. 21 (Apr. 2000). See also, "Harry Potter and the Court Battle Over Creativity", N.Y. Times, National section, pp. 1, 22 (4/1/ 2001) ("Legal challenges . . . over the originality of creative works have proliferated steadily over the last 20 years, partly because of the soaring value of intellectual property in a media-saturated culture.").

fictive substitute for "access" said to arise from "bad science" expert opinions of "striking similarity".

## III. REASONS WHY THE PETITION SHOULD BE GRANTED

The circuits have developed case law allowing dismissal of claims as a matter of law where plaintiff failed to show (1) that the works were substantially the same in their protectible expression[19] or (2) that any actionable similarities arose from actual copying. Actual copying may be direct, or it may be circumstantial evidence that certain similarities indicated copying ("probative similarity")[20] and that the creator of defendant's work had a reasonable opportunity to read or hear plaintiff's work ("access") by reason of wide public dissemination[21] or through intermediaries.[22]

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[19] 3 M. & D. Nimmer, *Nimmer On Copyright* ("*Nimmer*"), § 12.10[B][3], at 12-151 to -156; 4 *Nimmer*, § 13.01[B] at 13.8 to -14.

[20] 3 *Nimmer*, § 12.10[B][2] at 12-148 to -151; 4 *Nimmer*, § 13.01[B], at 13-10 to -13.

[21] *See, e.g., Repp v. Webber*, 858 F. Supp. 1292, 1301-03 (S.D.N.Y. 1994), *reversed on other grounds*, 132 F. 3d 882 (2d Cir. 1997), *cert. denied*, 525 U.S. 815 (1998); *Takeall v. Pepsico, Inc.*, 809 F. Supp. 19, 21 (D. Md. 1992), *aff'd*, 14 F. 3d 596 (4th Cir. 1993), *cert. denied*, 512 U.S. 1236 (1994); *Ferguson v. National Broadcasting Co.*, 584 F. 2d 111, 112-13 (5th Cir. 1978); *Selle v. Gibb*, 741 F. 2d 896, 901 (7th Cir. 1984); *Benson v. Coca-Cola Co.*, 795 F. 2d 973, 975 (11th Cir. 1986); 4 *Nimmer*, § 13.02[A] at 13-20 to -21; 1 *Patry*, at 697-98.

[22] *See, e.g., Grubb v. KMS Patriots, L.P.*, 88 F. 3d 1, 3-5 (1st Cir. 1996); *Towler v. Sayles*, 76 F. 3d 579, 582-83 (4th Cir. 1996); *Jason v. Fonda*, 698 F. 2d 966, 967 (9th Cir. 1982); *Herzog v. Castle Rock Entertainment*, 193 F. 3d 1241, 1249 (11th Cir. 1999); *Meta-Film Assocs., Inc. v. MCA, Inc.*, 586 F. Supp. 1346, 1355-59 (C.D. Cal. 1984) (cited in many circuits); 4 *Nimmer*, § 13.02[A] at 13-19 to -20; 1 *Patry*, at 698-99.

The decision below gives juries the unfettered power to decide what constitutes evidence of access, when access (combined with evidence of probative similarity) raises an inference of copying in fact, and even when some indeterminate degree of similarity substitutes for evidence of copying. Because jurors have no common experience in making such determinations,[23] and the law provides them no firm calculus, the possible impairment of free speech imposes on courts the responsibility of determining the outer limits of the jury's surmise. *See Warner Bros. v. American Broadcasting Cos.*, 720 F. 2d 231, 245 (2d Cir. 1983) affirming summary judgment and holding that:

> "[t]he 'substantial similarity' that supports an inference of copying sufficient to establish infringement of a copyright *is not a concept familiar to the public at large. . . . Courts have an important responsibility in copyright cases to monitor the outer limits within which juries may determine reasonably disputed issues of fact*" (emphases added).

### A. The Fourth Circuit's Decision Has So Reduced The Standard To Prove "Access" As To Threaten All Future Attempts To Dispose Of Unmeritorious Claims As A Matter Of Law

*Copying in fact*, or derivation, focuses on "the factual question whether the defendant, in creating its work, used the plaintiff's material as a model, template, or even inspiration." 4 *Nimmer*, § 13.01[B] at 13-8. Copyright law protects only against unlawful *copying* of a plaintiff's

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[23] And, as shown below at n. 37, "similarity experts" are better at advocacy than they are at creating a foundation for their opinions, juries are easily misled to defer to experts. *See Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 593 (1993) (describing "good science".)

work: "Proof of copying is crucial to any claim of copyright infringement because no matter how similar the two works may be (even to the point of identity), *if the defendant did not copy the accused work, there is no infringement.*"[24] *See Mazer v. Stein*, 347 U.S. 201, 218 (1954) ("Absent copying, there can be no infringement.") Accordingly, the issue of *derivation* is critical.

Courts have been imperceptibly lowering the standard of proof of copying over the years. Some earlier decisions held that the *actual* viewing and knowledge of plaintiff's work by the person who composed defendant's work was needed. More recent authority has held that the "reasonable opportunity to view or to copy" raises an *inference* of "access". 4 *Nimmer*, § 13.02[A] at 13-17 (stating that "the opportunity to copy" approach "is perhaps the more prevailing definition of access"); 1 *Patry*, at 696-97. The decision below has reduced the threshold of proof even further, indeed, eliminated it, by reducing "the opportunity to copy" to what is a mere physical possibility. Thus, access and even copying are becoming a fictional requirement of copyright infringement. Similarity is all.

What the "opportunity to copy" definition of access allows, however, is the construction of an inference upon an inference: from evidence of defendant's "opportunity" to view plaintiff's work, the jury may infer that the defendant *actually* viewed it, and from this inference may

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[24] *Selle v. Gibb*, 771 F. 2d 896, 901 (7th Cir. 1984); *accord Granite Music Corp. v. United Artists Corp.*, 532 F. 2d 718, 720 (9th Cir. 1976); *see also Feist Pubs., Inc. v. Rural Telephone Service Co.*, 499 U.S. 340, 361 (1991); 4 *Nimmer*, § 13.01[B] at 13-10.

further infer (with additional proof of substantial or probative similarity) that the defendant *actually* copied it.[25]

Such inferential proof of copying is really a matter of statistical probabilities:

> The rationale for the inference [of copying in fact] is that access gave the defendant the opportunity to copy the plaintiff's work, and that the similarities between the two works indicate that the defendant in fact seized the opportunity. *Copying in these cases is a question of probabilities. The point of the plaintiff's proof is to demonstrate that, in light of the defendant's access to plaintiff's work and the similarities between the two works, it is more probable than not that the defendant copied from the plaintiff's work.*

2 P. Goldstein, *Copyright*, § 7.2.1 at 7:6 to 7:7 (2d ed. 2001) (emphasis added).

One issue raised by the Petition – the sufficiency of the evidence presented by plaintiff as a matter of law to support the "access" finding of the jury – presents not a factual "credibility" issue[26] but a legal issue, which is reviewed under the same standard applicable to a motion for summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-52 (1986). Ultimately, whether the evidence in this case was sufficient presented a policy issue for judges, suitable for determination as a matter of law. Thus, the

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[25] *See Morse v. Fields*, 127 F. Supp. 63, 66 (S.D.N.Y. 1953) (characterizing as "double circumstantial evidence" the fact that the "availability of plaintiff's work is merely some circumstantial evidence of access, and access is merely circumstantial evidence of copying").

[26] A trier's disbelief of a defendant's denial of access does not constitute affirmative substantial evidence of access. *See Bose Corp. v. Consumers Union*, 466 U.S. 485, 512 (1984); *Goldhirsh Group, Inc. v. Alpert*, 107 F. 3d 105, 109 (2d Cir. 1997); *Newton v. National Broadcasting Co.*, 930 F. 2d 662, 680 (9th Cir. 1990), *cert. denied*, 502 U.S. 866 (1991).

Fourth Circuit's decision will almost certainly be trumpeted as the standard for what access evidence is sufficient to create a triable issue in the context of a motion for summary judgment and judgment as a matter of law, and on appeals from bench trials as well as jury verdicts.

Entertainment business companies – and individual artists – are regularly stalked by persons intent on making unsolicited submissions.[27] Although it is difficult to create a bright line test concerning "access", courts do create benchmarks on a case by case basis that guide authors, their attorneys, and potential plaintiffs. *See Volokh*, 107 *Yale L.J.* at 2455-59. The Fourth Circuit's decision, lowering the threshold for liability, exemplifies three continuing sources of confusion and irreconcilable results in the case law regarding the access issue.

### 1. The Decision Is A Dangerous Expansion Of The Corporate Receipt Doctrine

Where a company is involved as a defendant or even as an intermediary in a hypothetical chain of access, the plaintiff often argues that proof that a submission was received at the company acts as a virus which raises an inference that everyone in the company – no matter how large the company, or how far flung its facilities, or differentiated its activities – may be deemed to have promptly received it. *See* 4 *Nimmer*, § 13.02[A] at 13-17. The circuits and the leading cases are split on this subject with some circuits (and the Fourth Circuit in this case), App. A, at 23a-24a, apparently adopting the doctrine[28]

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[27] Unsolicited submissions arrive – or are allegedly sent – by fax, by mail, by personal delivery, or are supposedly sent like a message in a bottle, through friends, relatives and business associates.

[28] *See Moore v. Columbia Pictures Indus., Inc.*, 972 F. 2d 939, 942 (8th Cir. 1992); *Kamar Intl., Inc. v. Russ Berrie & Co.*, 657 F. 2d 1059, 1060, 1062 (9th Cir. 1981).

and others resisting it.[29] An often-cited district court decision, *Meta-Film Assocs., Inc. v. MCA, Inc.*, 586 F. Supp. 1346, 1355-57 (C.D. Cal. 1984) explained the fallacy in applying the doctrine to a claim based on submission of an unsolicited script sent to a movie studio that later produced "Animal House".

> [I]n such a business [film production], countless unsolicited scripts are submitted to numbers of individuals on studio lots everyday. Under these circumstances, it is clearly unreasonable to attribute the knowledge of any one individual . . . to every other individual just because they occupy offices on the same studio lot.

In this case, the majority relies on the doctrine in three of the four steps in the supposed chain of circumstances, assuming (1) that a faxed submission to MSA was received by someone at MSA who took a cue from the fax to pass it on to Moag's law office; (2) that alleged receipt by Moag's office meant actual receipt by Moag; (3) that because the Baltimore Ravens had an office in the same building (on a different floor) as Moag, there is a "building receipt" doctrine that caused everyone in the building including the Ravens presumptively to have received the submission; (4) that the Ravens' Baltimore office received the submission and sent the design to the NFLP office in New York; and (5) then, everyone at NFLP's New York office including the designers saw it. App. A, at 17a-22a.

As the dissent pointed out, the majority allowed *inferences* of corporate receipt to constitute substantial evidence even in the face of (1) denials of receipt by

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[29] *Grubb v. KMS Patriots, L.P.*, 88 F. 3d 1, 3-5 (1st Cir. 1996); *Morrissey v. Procter & Gamble Co.*, 379 F. 2d 675 (1st Cir. 1967); *Dimmie v. Carey*, 88 F. Supp. 2d 142, 146-49 (S.D.N.Y. 2000); *Tisi v. Patrick*, 97 F. Supp. 2d 539, 547-48 (S.D.N.Y. 2000); *Novak v. National Broadcasting Co.*, 752 F. Supp. 164 (S.D.N.Y. 1990).

MSA's office, by Moag, by Moag's office, by the Ravens, by the NFLP office, by the NFLP designers, and (2) the existence of a practice by Moag not to forward materials to the Ravens, and direct evidence that the Ravens sent no materials to NFLP during the relevant period. See App. A at 17a-22a.[30]

### 2. The Decision Improperly Allows Inferences Of "Access" That Are Contradicted By Direct Denials Of Receipt And Practices Preventing Receipt To Constitute Substantial Evidence of Copying

There is no reason to change the laws of evidence for copyright infringement cases. Thus, this Court's admonition that inferences may not be indulged in the face of uncontradicted direct evidence that contradicts the proposed inference, *Pennsylvania R.R. Co. v. Chamberlain*, 288 U.S. 333, 341 (1931), should have been determinative of the outcome below. This case then illustrates a continuing problem where a jury is allowed to draw inferences of access that are flatly contradicted either because of a direct denial of a receipt of a submission or because of practices that prevented the fact assumed by the inference, in this case acceptance and transmittal of submissions in contradiction to firewalls intended to prevent any such access. Not only does the Fourth Circuit's approach contradict this Court's rule on the permissible of inferences, note 30, *supra*, but it creates conflicts with established case law of other circuits.[31] This issue is

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[30] Indulging such inferences in the face of uncontradicted evidence conflicted with a decision of this Court. *Pennsylvania R.R. Co. v. Chamberlain*, 288 U.S. 333, 341 (1931).

[31] *Grubb v. KMS Patriots, L.P.*, 88 F. 3d 1, 3-5 (1st Cir. 1996); *Repp v. Webber*, 858 F. Supp. 1292, 1301-03 (S.D.N.Y. 1994), *reversed on other grounds*, 132 F. 3d 882 (2d Cir. 1997); *Towler v. Sayles*, 76 F. 3d 579, 582-83 (4th Cir. 1996); *Takeall v. Pepsico*, 809

obviously important to *amici* who are encouraged to create such firewalls and are discouraged to learn that some courts ignore them.

### B. The Fourth Circuit's Alternative Holding That "Striking Similarity" Raises An Inference Of Access And Of Copying Is "Bad Science" And Threatens To Eliminate "Copying" As An Element of Copyright Infringement.

It is a fundamental tenet of copyright that similarity does not alone create liability; there is no infringement in the absence of copying. *Mazer v. Stein*, 347 U.S. at 218. Yet, the decision below held, in the alternative, that evidence of "striking similarity" may create an inference of access, which would support a finding of copying, even where there is no other evidence of access. App. A, at 8a-9a. In doing so, the Fourth Circuit purported to distinguish itself from the Fifth Circuit which allows copying to be proven without a showing of access where striking similarity precludes the possibility of independent creation.[32]

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F. Supp. 19, 21 (D. Md. 1992), *aff'd*, 14 F. 3d 596 (4th Cir. 1993); *Peel & Co., Inc. v. Rug Market*, 238 F. 3d 391, 394-95 (5th Cir. 2001); *Ferguson v. National Broadcasting Co.*, 584 F. 2d 111, 113 (5th Cir. 1978); *Selle v. Gibb*, 741 F. 2d 896, 901 (7th Cir. 1984); *Meta-Film Assocs., Inc. v. MCA, Inc.*, 586 F. Supp. 1346, 1355-59 (C.D. Cal. 1984) (followed in many circuits); *Herzog v. Castle Rock Entertainment*, 193 F. 3d 1241, 1251, 1256 (11th Cir. 1999); *Benson v. Coca-Cola Co.*, 795 F. 2d 973, 975 (11th Cir. 1986). And, see *Ellis v. Diffie*, 177 F. 3d 503 (6th Cir. 1999) (no "clear error" in rejecting speculative evidence of access through intermediary record executive).

[32] *Accord*: Since "independent creation" simply means that defendant did not copy from plaintiff's work, *Keeler Brass Co. v. Continental Brass Co.*, 862 F. 2d 1063, 1066 (4th Cir. 1988); *Latman*, at 704-05, this is of course tautological and reduces the rule to an assertion that some types of similarity implicitly must have resulted from copying plaintiff's work.

App. A at 8a, citing *Ferguson v. National Broadcasting Co.*, 584 F. 2d 111, 113 (5th Cir. 1978).[33] But, even though the Fourth Circuit states that "access remains an indispensable part of a copyright infringement claim", the Fourth Circuit, just like the Fifth Circuit, dispenses with the need to prove "access" by simply stating that similarity – one half of the equation creating an inference of actual copying – is one way to demonstrate access. *Ibid.*

Decisions of other circuits still require some evidence of access, no matter how slight, before the "striking similarity" doctrine may raise an inference of copying.[34] Even so, the use of "striking similarity" to create an inference of access remains "a controversial method". 1 *Patry*, at 700.

Worse, the doctrine as commonly employed is just "bad" science. *See Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 593 (1993) (describing "good science").[35]

An early decision, *Keene v. Wheatley*, 14 F. Cas. 180, 195 (C.C.E.D. Pa. 1861) (No. 7,644), illustrates the "scientific" rationale for the "striking similarity" doctrine:

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[33] *Accord*: *Baxter v. MCA, Inc.*, 812 F. 2d 421, 423-24 & n. 2 (9th Cir.), *cert. denied sub nom., Williams v. Baxter*, 484 U.S. 954 (1987).

[34] 4 *Nimmer*, § 13.02[B] at 13-22; *Selle*, 741 F. 2d at 902 (emphasis added) (even "striking similarity" cannot create an inference of copying without *"some minimum threshold of proof which demonstrates that the inference of access is reasonable."*); *accord*: *Grubb*, 88 F. 3d at 5-6. *See* R. Osterberg, "Striking Similarity and the Attempt to Prove Access and Copying in Music Plagiarism Cases," 2 *J. Copyright, Ent. & Sports L.* 85 (1983).

[35] Even if the expert opinion were not strictly speaking about "scientific knowledge," this Court applies the gatekeeping function as well to testimony based on "technical" and other "specialized knowledge." *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999).

> [A] prolonged series of thoughts or statements, each one in itself simple, cannot have been expressed originally by two persons in the same words arranged in the same succession. In language of a mathematician, such a coincidence is infinitely improbable. It has, from experience, been long recognized as absolutely impossible.

Thus, the striking similarity doctrine assumes a scientific basis – statistics – and the assumption that experts or even laypersons may reach a demonstrably rational decision about such a conclusion. But, neither in this case nor in any other case[36] where the doctrine has been invoked, has there been any expert yet to explain for the trier of fact (1) how many possible differences there could be in two works produced at the same time about the same subject matter, and (2) at what point the number or nature of similarities (and at what level of similarity) one would conclude with certainty that statistically the similarities were other than the result of coincidence, reliance of prior common sources or independent creation.[37] Instead, by allowing experts to casually testify about such statistical judgments, the case law undermines the fundamental copyright principle that even if two works are identical, they are not infringing unless one has been copied from the other. *Mazer v. Stein*, 347 U.S. at 218.

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[36] One possible exception is proof that a defendant has copied errors in plaintiff's work. 4 *Nimmer*, § 13.03[C] at 13-74 to -75. In *Financial Information, Inc. v. Moody's Investors Service*, 751 F. 2d 501, 503, 509 (2d Cir. 1984), the court approved expert testimony by a mathematician that defendants' copying of planted errors showed a 95% probability of copying.

[37] Nor is there any showing by experts that their "methodology" is reliable, subject to peer review, has a known or potential error rate or widespread acceptance within a relevant scientific community. *Daubert*, 509 U.S. at 593-95. One result is that experts have learned to sprinkle their testimony about similarities with the word "striking."

The decision below did not rely on any finding of literal copying but rather on the selection, coordination and arrangement of "several public domain elements which are not protectible." App. A at 10a. Indeed, both drawings involve a shield with a B for "Baltimore" and some symbols drawn from the Maryland State flag, and wings no doubt bespeaking the association with a "raven". In the face of such commonplace elements, it is not clear how any expert could plausibly contend that the similarities could *only* be the result of copying rather than reliance on common sources, independent creation or coincidence.

## IV. CONCLUSION

The Fourth Circuit's decision threatens to subject creative efforts, speech interests, and substantial investments to a judicial policy that allows unpredictable and unprincipled legal decisions, with attendant deleterious results to a national copyright policy. Too much speech will be wrongly punished and too many reputations will be sullied while the Fourth Circuit's decision percolates through the federal courts, even if the Fourth Circuit ultimately tries in later decisions to modify or correct its misstep. The Petition for a writ of certiorari should be granted.

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